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No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ELIAS MARSTERS and E. F. LAKIN,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Filed

SEP 20 1915

F. D. Monckton,
Clerk.

Upon Appeal from the United States District Court for the
District of Idaho, Southern Division.

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ELIAS MARSTERS and E. F. LAKIN,
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District of Idaho, Southern Division.**



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B. E. STOUTEMYER,

United States Reclamation Service,
Boise, Idaho;

Attorneys for United States of America.

*In the District Court of the United States, in and
for the District of Idaho, Southern Division.*

.....TERM, A. D. 1915.

IN EQUITY.

UNITED STATES OF AMERICA, Complainant,
vs.
ELIAS MARSTERS and E. F. LAKIN,
Defendants.

BILL OF COMPLAINT.

Complainant alleges:

I.

That this action is brought by C. H. Lingenfelter, United States Attorney for the District of Idaho, by authority of the Attorney General of the United States pursuant to application therefor made by the Secretary of the Interior.

II.

That on December 4, 1903, C. W. Moore, John Plowhead, Peter Sonna, J. H. Lowell, Frank Steunenberg, H. A. Partridge, E. M. Kirkpatrick, Edward K. Hayes, Edward Allen and W. A. Coughanour, all citizens and residents of the State of Idaho, filed with the State Engineer of Idaho an applica-

tion for permit to appropriate and divert 5,200 cubic feet per second of the waters of Boise River for the irrigation of the lands in Ada and Canyon Counties, Idaho, now known as the Government Boise Project, and for the purpose of the construction of said project by the Secretary of the Interior of the United States under the Act of Congress of June 17, 1902 (32 Stat. L. 388), known as the Reclamation Act.

III.

That thereafter, on January 19, 1904, the State Engineer of Idaho approved said application and granted said permit and numbered said permit Permit No. 430.

IV.

That thereafter, on the 24th day of February, 1904, the said above named parties who filed said application for permit and to whom said permit was granted, assigned the said permit to the Honorable E. A. Hitchcock, Secretary of the Interior of the United States, for the purpose of the construction of said irrigation project under the provisions of the Act of Congress of June 17, 1902 (32 Stat. 388), known as the Reclamation Act.

V.

That the Secretary of the Interior caused surveys and investigations to be made for said project and found the same to be practicable and feasible and thereafter let contracts for the construction thereof under the provisions of the said Act of Congress of June 17, 1902.

VI.

That within the time named in said permit for the completion of works, the diversion works, canals and laterals for the purpose of conveying water to the point of intended use, had been constructed and completed to a capacity of 1647 second-feet, and the United States, acting through the Secretary of the Interior, made due proof of the completion of said works to said capacity of 1647 second-feet and the State Engineer of Idaho examined said proof and works constructed under said permit and accepted said proof and issued to the United States under said permit a certificate of completion of works to a capacity of 1647 second-feet.

VII.

That the United States has also made and perfected other filings and appropriations upon the waters of Boise River of later date than the one above described, and has constructed works of an additional capacity for the diversion thereof.

VIII.

That the said 1647 second-feet is the first Government appropriation from Boise River and is under date of priority of December 4, 1903.

IX.

That the said 1647 second-feet has been actually diverted through the said irrigation works of the Government Boise Project and applied to beneficial use in the irrigation of the lands included in said project.

X.

That in the year 1906 a certain decree was entered in the District Court for the Third Judicial District of the State of Idaho, in the case of Farmers' Co-operative Ditch Co. vs. Riverside Irrigation District, et al., commonly known as the Stewart Decree, in which Decree the duty of water from the Boise River was decreed by the District Court to be one miners' inch per acre on bench lands and 1.1 miners' inches on bottom lands, and certain amounts of water awarded and decreed to various canal companies and individuals, diverting water from Boise River, said amounts being determined on the basis of one miners' inch per acre on bench lands and 1.1 miners' inches per acre on bottom lands.

XI.

That the Complainant, the United States of America, was not a party to said suit, nor served with process, nor were its rights adjudicated in said Decree, and said Decree did not purport to determine the rights of the United States, nor the rights of any of the parties thereto as against the United States.

XII.

That an appeal was taken from said decision and Decree in the District Court to the Supreme Court of the State of Idaho and that the Supreme Court found that said Decree of the District Court fixing one miners' inch per acre and 1.1 miners' inches per acre as the duty of water from Boise River, was not supported by the evidence, and that one miners' inch per acre of water was more than was necessary for the

irrigation of the lands using water from Boise River, and reversed the decision of the lower court on the question of the duty of water, which included the amount decreed to the several canals, and vacated the order of the District Court and sent said case back to the District Court for rehearing as to the duty of water.

XIII.

That each year since said decision of the Supreme Court and for four years past, the District Court has each year made a temporary order or decree for that year, establishing for each year a higher duty of water than that provided in the Decree of the District Court of 1906, and establishing six-tenths (6-10ths) of a miners' inch per acre as the duty of water for the season in question.

XIV.

That said amount of six-tenths (6-10ths) of a miners' inch per acre has been found by actual use and experience, during the period of four years, to be sufficient for the irrigation of lands entitled to receive water from Boise River.

XV.

That the temporary order issued for the season of 1912 was for the season of 1912 only, and expired under its own terms at the end of the irrigation season of 1912.

XVI.

That the order and decree entered by the District Court in 1906 is not now in effect because it has been

vacated by the Supreme Court as to the duty of water and as to the amount awarded to the several canals.

XVII.

That up to the present time no order or decree of any kind has been issued by the court for the distribution of water during the season of 1913 and no party has yet presented to the court any application for an order of the court distributing the waters of Boise River for the season of 1913.

XVIII.

That the amount of the rights of the several appropriators from Boise River is not now decreed by the court and no order has been issued for the distribution thereof.

XIX.

That Elias Marsters and E. F. Lakin, assuming to act as Water Commissioner and Watermaster respectively, but without authority of any Decree of the court or order of the court, have gone upon the Government diversion works and threatened to interfere with the Government headgates and to break or unlock the locks of the Government headgates and shut down the Government headgates and to put into effect the said Decree of the District Court of 1906, and to deliver to certain canals, water in excess of one miners' inch per acre and to shut the water out of the Government canal in violation of the decision of the Supreme Court and without authority of any order or decree of court and in violation of the rights of the United States.

XX.

That there is an abundance of water flowing in Boise River to supply all appropriations upon the basis of six-tenths (6-10ths) of a miners' inch per acre or any other reasonable or proper duty of water but there is not sufficient water flowing in the Boise River to supply the needs of the water users from Boise River if an amount equal to or in excess of one miners' inch per acre is allowed as the duty of water.

XXI.

That the said Government Boise Project includes approximately 240,000 acres of land, all of which in its natural state is arid and unproductive, and requires irrigation to produce agricultural crops thereon.

XXII.

That of this amount about 80,000 acres has a partial water supply from other sources prior to the construction of the Government irrigation works, and is under contract to the Government for a supplemental supply of water from the Government works and about 160,000 acres was entirely without water supply until the construction of the Government irrigation works, and has no other source of water supply whatever except from the Government works.

XXIII.

That upon this 160,000 acres about 2,000 homestead entrymen and land owners have settled with their families and have cleared the land and put it

into cultivation and are growing crops thereon, which crops will be ruined and destroyed if they are deprived of the water with which to irrigate the same, and that said settlers and entrymen are also dependent upon the water supply from the Government canal for necessary water for domestic purposes and for the purpose of watering their stock.

XXIV.

That six-tenths (6-10ths) of a miners' inch of water per acre is a reasonable and proper duty of water and that one miners' inch per acre is an excessive and wasteful duty of water and would result in much land being entirely deprived of water and the entire loss and destruction of crops on thousands of acres of land which would be saved under any reasonable or proper duty of water.

XXV.

That great and irreparable injury will be done to said entrymen and to the United States if the said water supply is shut off.

XXVI.

That the Complainant will be damaged in the amount of Ten Thousand (\$10,000) Dollars per day for each and every day that the water is shut out of said Government canal wrongfully and illegally as threatened by said Defendants.

Wherefore, the Complainant prays that the Defendants, their agents, subordinates and employees, and all persons acting under them, be enjoined and restrained from interfering with said Government

headgates without an order of the court authorizing them to do so, and have damages in the sum of Ten Thousand (\$10,000) Dollars per day for each and every day that the water is shut out of said canal wrongfully and illegally as threatened and attempted by said Defendants, and that Defendants be enjoined from distributing said water of Boise River upon the basis of the said duty of water of one miners' inch and one and one-tenth (1.1) miners' inches per acre, which has been reversed and set aside by the Supreme Court of the State.

C. H. LINGENFELTER,
United States Attorney for the District of Idaho.

B. E. STOUTEMYER,
Residence: Boise, Idaho.

State of Idaho,
County of Ada,—ss.

George H. Bliss, being first duly sworn, on oath deposes and says:

That he is Project Manager of the United States Reclamation Service, employed on the Boise Project of the United States referred to in the above entitled cause of action, and makes this verification in its behalf.

That he has read the foregoing Bill of Complaint, knows the contents thereof, and believes the facts therein stated to be true.

GEORGE H. BLISS,
Project Manager U. S. R. S., Boise Project.

Subscribed and sworn to before me this 12th day of July, 1913.

(Seal)

A. E. EBY,
Notary Public.

My commission expires February 27, 1917.

Endorsed: Filed July 12, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
vs.

ELIAS MARSTERS and E. F. LAKIN,
Defendants.

NOTICE TO SHOW CAUSE.

To Elias Marsters and E. F. Lakin, above named Defendants:

You and each of you are hereby notified that there is a complaint on file in the above entitled cause, alleging, among other things, that the United States has constructed certain diversion works, canals and laterals to a capacity of sixteen hundred forty-seven (1647) second feet from the Boise River, and has made due proof of the completion of said works, and the State Engineer of Idaho examined said proof under said permit, and accepted said proof and issued to the United States a certificate of completion of works to a capacity of 1647 second feet; that the United States has also made and perfected other

filings and appropriations upon the waters of Boise River; that the said 1647 second feet has been actually diverted through the said irrigation works of the Government Boise Project, and applied to beneficial use; that said defendants, assuming to act as Water Commissioner and Watermaster, respectively, but without authority of any decree of the court or order of the court, have gone upon the Government Diversion Works and threatened to interfere with the Government headgates, and to break or unlock the locks of the Government headgates and to shut the water out of the Government's canal in violation of the rights of the United States; that the said Government Project includes approximately two hundred forty thousand (240,000) acres of land which requires irrigation to produce agricultural crops thereon, and praying that defendants and all persons acting under them be restrained and enjoined from interfering with said Government headgates without order of the court authorizing them to do so, and for damages in the sum of Ten Thousand Dollars (\$10,000.00) per day for each and every day that the water is shut out of said canal wrongfully and illegally as threatened and attempted by said defendants.

You are further notified to appear on the 17th day of July, 1913, at 10:00 o'clock a. m., at the Federal Court Room in Boise, Idaho, and show cause why temporary restraining order pendente lite should not be granted restraining yourselves and all persons

acting under you from interfering with said head-gates without an order of the court authorizing you so to do.

A copy of the complaint, together with the affidavit of George H. Bliss, is hereto attached and made a part of this notice.

C. H. LINGENFELTER,
United States Attorney for the District of Idaho.
B. E. STOUTEMYER,
Residence: Boise, Idaho.

Endorsed: Filed July 12, 1913.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
VS.
ELIAS MARSTERS and E. F. LAKIN,
Defendants.

MOTION TO DISMISS.

Now come the defendants, and move the court to dismiss the Bill of Complaint herein for the following reasons, to-wit:

I.

That said bill of complaint fails to allege any matter of equity entitling the plaintiff to the relief prayed for therein.

II.

That said bill of complaint shows upon its face that

this court is without jurisdiction of the subject matter of this action.

J. H. PETERSON,
J. J. GUHEEN,
T. C. COFFIN,
Solicitors for the Defendants.

Service of the foregoing motion to dismiss admitted this 1st day of August, 1913.

C. H. LINGENFELTER,
United States Attorney.

By Maude L. Bay.

Endorsed: Filed Aug. 1, 1913. A. L. Richardson, Clerk.

*In the United States District Court for the District
of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
VS.
ELIAS MARSTERS and E. F. LAKIN,
Defendants.

October 11, 1913.

MEMORANDUM DECISION ON DEMURRER.

C. H. LINGENFELTER, Esq.,
B. E. STOUTEMYER, Esq.,
Attorneys for Complainant.
J. H. PETERSON, Esq.,
J. J. GUHEEN, Esq.,
T. C. COFFIN, Esq.,
Attorneys for Defendants.
DEITRICH, District Judge.

As stated orally from the bench at the conclusion of the argument, the status of the United States in this suit is precisely that of a private individual or corporation. As a suitor it has the rights, no greater and no less, of the owner of an irrigation canal. It is entitled to the same protection as any other water user and is subject to the same limitations and conditions.

As further explained at that time, it cannot be held that there is any decree adjudicating the water rights on the Boise River. By reason of the reversal or modification by the Supreme Court of the decree originally entered in the suit referred to it is ineffective for any purpose. The prime requisites of any decree in a water right suit are both the date and the amount of the appropriation. As the decree in the case referred to now stands it only fixes the date of the appropriations.

There was left but one question for consideration, namely, whether or not a Water Commissioner, appointed and acting under the irrigation law, has the power and authority through a watermaster appointed by him, or otherwise, to control the diversion gates upon a stream the rights in which have not been adjudicated or otherwise definitely determined. In a brief now presented by counsel for the defendants, emphasis is placed upon certain expressions and passages in the irrigation act (Idaho Revised Codes, Section 3240, et seq.) which have a tendency to support the view that a Commissioner has such power, but upon an analysis of the entire act I am unable to

avoid the conclusion that the Legislature did not intend to confer such unlimited authority. It is true that in Section 3270 it is provided that: "The Commissioner of each water division shall have immediate direction and control of the acts of the watermasters and the distribution of water from all the streams to the canals diverting therefrom in his division, etc.," but this provision must be read in connection with other provisions of the law. It may very well be that the Commissioner has a measure of supervisory authority over all watermasters, but it does not follow that he has the power to appoint watermasters in all cases or that he has the authority to interfere with canals or regulate the distribution of water, in cases where he is without power to appoint a watermaster to perform such duties.

Upon an examination of Section 3274 it will appear that the Commissioner has no authority to appoint a watermaster to distribute waters of a stream the rights in which have not been adjudicated, and it will also appear, I think, that it was not intended that the Commissioner should exercise anything more than a supervisory jurisdiction in such cases. Section 3274 directs the Board of Irrigation to divide the state into water districts, and it provides that: "The water districts which shall be first created are those which will embrace the streams whose rights have already been allotted by the District Court, the distribution of which shall, by the provisions of this chapter, be under the control of the Water Commissioners for the divisions in which such stream or

streams are situated. Other districts shall be created from time to time as the appropriations and priorities thereof from the streams of this state shall be confirmed or adjudicated." There is no intimation here of authority in the Board of Irrigation to create districts except in cases where the water rights have been adjudicated.

It is further provided in this section that when irrigation works are owned by a company or association of water users the Water Commissioner may, upon petition of such company or association, appoint a water master to take charge of the water from such works, but in such cases the Water Commissioner can act only upon petition of the company or association. There is another provision in this section by virtue of which, in certain cases, even of adjudicated water rights, the water master is not appointed by the Water Commissioner, but he is elected by the water users.

Section 3275 purports generally to confer authority upon the Water Commissioner to appoint a water master for any water district created under the provisions of the chapter in which the section is contained, but this general provision is of course to be read subject to the limitations and specific exceptions embraced in other parts of the chapter; for instance, the exception just referred to embraced in the next preceding section. And in this very section, viz., 3275, it is expressly provided "that any vicinity or neighborhood, the inhabitants of which use the waters of any ditch or stream the rights in which have

not been allotted, shall constitute a water district,” and that not the Water Commissioner but the water users have the right to select a water master. Detailed provision is made for the time of holding a meeting and the manner in which it shall be called, for the election of such water master, and for his qualifications. While such water master so elected is in a sense subject to the supervision of the Water Commissioner, his duties are prescribed by law, and the scope of his authority is defined, and the Water Commissioner cannot relieve him of any of such duties or enlarge the statutory scope of his authority. He is to distribute the water to those who are entitled thereto, and he cannot “interfere with the vested rights of individuals, companies or corporations, or in any manner interfere with the rights of individuals, companies or corporations to the use and control of water the right to the use of which is or may be their private property.”

It follows from these considerations that, to say the least, no presumption arises from the mere allegation in the complaint “that Elias Marsters and E. F. Lakin, assuming to act as Water Commissioner and water master, respectively, but without any authority of any decree of the Court or order of the Court,” interfered with and injured the plaintiff’s headgate and canal, that in so doing they were acting within the scope of their official authority or were in the rightful exercise of their official discretion. That being the case, the complaint upon its face exhibits facts sufficient to entitle the plaintiff

to equitable relief and the cause of action is within the jurisdiction of this court. The motion to dismiss will therefore be denied, and the defendants will be given ten days from the date hereof in which to answer.

FRANK S. DIETRICH,

District Judge.

Endorsed: Filed Oct. 11, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
vs.

ELIAS MARSTERS and E. F. LAKIN,
Defendants.

AFFIDAVIT.

George H. Bliss, being first duly sworn, deposes and says that following the threats made by the Defendants herein as alleged in the Bill of Complaint, said Defendants, Elias Marsters and E. F. Lakin, and certain other persons whose names are to the affiant unknown, acting under the direction of said Elias Marsters, went upon the Government property and withdrawn lands of the United States and the Government Diversion Dam and headgates of the Government Canal on the Boise Project, and broke the lock on said headgates and interfered with said headgates and turned out of said Government Canal all of the water included in the Government's water

appropriation as described in the Bill of Complaint, although there was at that time in the Boise River and is still in the Boise River, enough water, if distributed as decreed in the temporary orders of previous years, or any reasonable or proper duty of water, to supply to all users of water from Boise River sufficient water for the irrigation of all crops growing in the Boise Valley.

That by said acts of the Defendants, several thousand settlers and farmers under the Government irrigation system are deprived of water and their crops being destroyed, although there is now sufficient water in the river, if distributed in any reasonable or lawful way, to supply water to all water users and serve all crops now growing in the Boise Valley, and that said parties threaten to and will continue said unlawful trespass and interference with said Government headgates and canal system and other property unless restrained by an order of the court.

GEORGE H. BLISS.

Subscribed and sworn to before me this 12th day of July, 1913.

(Seal)

A. E. EBY,
Notary Public.

My commission expires Feby. 27, 1917.

Endorsed: Filed July 12, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States, in and
for the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
vs.

ELIAS MARSTERS and E. F. LAKIN, Defendants.
PETITION FOR LEAVE OF COURT TO FILE
SUPPLEMENTAL BILL OF COMPLAINT.

The Complainant hereby petitions your Honorable Court for permission of the court to file in the above entitled cause a Supplemental Bill of Complaint setting out certain material facts and certain acts of the Defendants which have occurred and been performed since the filing of the original Complaint herein, a copy of which Supplemental Bill of Complaint is hereto attached and made a part of this Petition; that the reason for the filing of said Supplemental Bill of Complaint is that subsequent to the acts complained of in the original Bill of Complaint and the filing of said original Bill of Complaint, the Defendants committed certain trespasses upon the property of the United States and did certain acts and things to the damage of the United States, the nature, extent and duration of which was not and could not be known at the time of the filing of the original Bill of Complaint, and that said acts are more particularly described and set forth in the attached Supplemental Bill of Complaint, for the filing of which permission of the court is asked.

C. H. LINGENFELTER,

United States Attorney, District of Idaho.

Endorsed: Filed November 1, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

THE UNITED STATES OF AMERICA,

Plaintiff,

VS.

ELIAS MARSTERS and E. F. LAKIN,

Defendants.

STIPULATION.

It is hereby stipulated and agreed by and between the respective parties hereto that the defendants be given to and including Monday, October 27, 1913, in which to prepare and file their answer in the above entitled action.

C. H. LINGENFELTER,

Attorney for Plaintiff.

J. H. PETERSON,

Attorney for Defendants.

Endorsed: Filed Oct. 20, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States, in and for
the District of Idaho, Southern Division.*

THE UNITED STATES OF AMERICA,

Plaintiff,

VS.

ELIAS MARSTERS and E. F. LAKIN,

Defendants.

STIPULATION.

It is hereby stipulated and agreed by and between the respective parties hereto that the defendants be

given until Wednesday, November 5, 1913, in which to prepare and file their answer in the above entitled action.

C. H. LINGENFELTER,
Attorney for Plaintiff.

J. H. PETERSON,
Attorney for Defendants.

Endorsed: Filed Oct. 25, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States, in and for
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
vs.
ELIAS MARSTERS and E. F. LAKIN,
Defendants.

STIPULATION.

It is hereby stipulated and agreed by and between the respective parties hereto that the defendants shall have until December 1, 1913, in which to prepare and file their answer in the above entitled action.

B. E. STOUTEMYER,
Attorney for Complainant.

J. H. PETERSON,
Attorney for Defendants.

Endorsed: Filed Nov. 21, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States, in and for
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,

vs.

ELIAS MARSTERS and E. F. LAKIN,

Defendants.

ANSWER.

These defendants, reserving all manner of exceptions that may be had to the many uncertainties and imperfections of the bill, come and answer thereto, or to so much thereof as they are advised is material to be answered to, and say:

I.

Admit the allegations contained in paragraphs I, II, III and IV of the Bill of Complaint.

II.

Answering paragraph V of said Bill of Complaint, these defendants have not sufficient knowledge, information or belief to enable them to answer as to whether the Secretary of the Interior caused surveys and investigations to be made for said project and found the same to be practicable and feasible, and thereafter let contracts for the construction thereof, under the provisions of said Act of Congress of June 17, 1902, but demand strict proof thereof.

III.

Defendants, and each of them, deny that within the time named in said Permit No. 430 for the completion of works, or at any other time, the diversion

works, canals, or laterals, or any works, canals, or laterals, for the purpose of conveying water to the point of intended use, have been constructed, or completed to a capacity of 1647 second feet, or to a capacity of any other number of second feet, or that the United States, acting through the Secretary of the Interior, or that the United States, acting through any other official of the United States of America, in any manner at all, made due proof of the completion of said works to said capacity of 1647 second feet, or made due proof of the completion of said works to any capacity, whatever, and specifically deny that the United States, acting through the Secretary of the Interior, or any other officer of the United States, had the works so completed within the time named in said Permit No. 430 that it could make due proof of the completion of said works to the capacity of 1647 second feet, or any other number of second feet; and deny that the State Engineer of the State of Idaho examined said proof, and specifically deny that the State Engineer of the State of Idaho examined the works constructed under said Permit No. 430, or that he accepted said proof or issued to the United States, under said permit, a certificate of completion of the works to a capacity of 1647 second feet, or to a capacity of any number of second feet.

IV.

Answering paragraph VII of said Bill of Complaint, these defendants have not sufficient information or belief to enable them to answer as to whether

the United States has also made and perfected other filings and appropriations upon the waters of Boise River of later date than the one above described, and has constructed works of an additional capacity for the diversion thereof, but demand strict proof thereof.

V.

Defendants have no knowledge, information or belief as to enable them to answer the allegation that the said 1647 second feet is the first government appropriation from Boise River and is under date of priority of December 4, 1903, but demand strict proof thereof.

VI.

As to the allegations contained in paragraph IX of said Bill of Complaint, that the said 1647 second feet have been actually diverted through the said irrigation works of the Government Boise Project, and applied to the beneficial use in the irrigation of the lands included in said project, these defendants have not sufficient information or belief to enable them to answer, but demand strict proof thereof.

VII.

Admit the allegations contained in paragraph X of said Bill of Complaint.

VIII.

Answering paragraph XI of said Bill of Complaint, admit that the complainant, the United States of America, was not a party to said suit, nor served with process, but deny that its rights in and to the

subject matter of said action were not determined in said decree, and deny that said decree did not purport to determine the rights of the United States and all other parties or persons interested in the subject matter of said action, including the United States, and deny that said decree did not purport to determine the rights of any of the parties thereto as against the United States; but, on the contrary, these defendants, and each of them, allege that the complaint in said action on which the decree mentioned in paragraph X of Plaintiff's Bill of Complaint was entered was filed in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, now the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Canyon, at 4 o'clock P. M., August 20, 1902, at which time the plaintiff herein had no right, title or interest in or to the use of any water of Boise River, and was not a necessary party.

IX.

Admit all the allegations of paragraph XII of Plaintiff's Bill of Complaint, excepting the allegation contained in the following words, "and vacated the order of the District Court," but defendants, and each of them, deny that said Supreme Court vacated the order of the District Court.

X.

Deny that each year since said decision of the Supreme Court for a period of four years past, the

District Court has each year made a temporary order or decree for that year, or any portion of the year, except as hereinafter alleged, or established for each year a higher duty of water than that provided in the decree of the District Court of 1906, except as hereinafter alleged; and denies that the said District Court has ever established six-tenths of an inch per acre as the duty of water for any season, but, on the contrary, allege that during the early part of the irrigation season there is an abundance of water in Boise River to supply all the appropriators named in said decree with water to the amount so named, and that each year during the latter part of July, or the early part of August, the waters of Boise River become insufficient to supply the appropriators named in said decree with the amount so named, and remain so during the remainder of said season, and that ever since said decision of the Supreme Court of the State of Idaho, and for four years last past, there was, and is, a general understanding among the attorneys in the case of the Farmers Co-operative Ditch Company, a corporation, vs. the Riverside Irrigation District, a corporation, et al., that the said decree as above set forth should be followed each year until such times as the waters of Boise River become insufficient to supply the appropriators named in said decree, and that when said waters of the Boise River become insufficient to supply the said appropriators of Boise River in accordance with the terms of said decree, an appropriator who has a late appropriation came into said district court, the court which has

the jurisdiction of said action, asking that a temporary order be made by said district court for a higher duty of water than that named in said decree during the remainder of the irrigating season for that specific year; and that each year during the four years last past, an appropriator who is a late appropriator under said decree of the waters of Boise River, has filed a petition in the said District Court, during the latter part of July or the early part of August,, and on such petition has obtained a temporary order from said District Court, establishing a higher duty of water than that established in the decree above mentioned during the remainder of such irrigation season or until a further order of the court, which temporary order had for its basis a certain per cent or part of the water allotted under the original decree. That during each irrigating season during said time, and in accordance with said understanding, as above alleged, the Water Commissioner and Water Master of Boise River distributed the water of Boise River under said decree and until such times when they were directed to do differently by said temporary order.

XI.

Deny that six-tenths of a miner's inch per acre has been found by actual use and experience, or actual use or experience, during the period of four years, or at any other time, or at all, to be sufficient for the irrigation of the lands entitled to receive water from Boise River, but on the contrary allege that it has been found by actual use and experience that it re-

quires one miner's inch per acre to irrigate the lands entitled to receive water from Boise River during the early part of the irrigation season and until about July 20th of each year and that a less amount per acre has been found to be sufficient during the remainder of the irrigation season.

XII.

Answering paragraph XVI of said Bill of Complaint, deny that the order and decree entered by the District Court in 1906 is not now in effect.

XIII.

Defendants deny that at the present time no order or decree of any kind has been issued by the court for the distribution of the water during a part of the irrigation season of 1913, or that no party has presented to the court an application for a temporary order of the court to distribute the waters of Boise River for a portion of the season of 1913, but on the contrary allege that the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Canyon, had, and has had, for seven years last past, jurisdiction of the subject matter of this action, and that on or about the day of July, 1913, a petition was filed in said court by the New York Canal Company, Limited, one of the defendants and cross-complainants in said action, asking for a temporary order, and that notice was given by Cavanah, Blake & MacLane, attorneys for said defendant, the New York Canal Company, Limited, which notice is hereinafter set out in paragraph V

of defendants' further answer, and is hereby referred to and made a part hereof; and that on or about the 18th day of July, 1913, the said District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Canyon, made an order upon said petition, which order is set out in paragraph V of defendants' further answer, and is hereby referred to and made a part hereof.

XIV.

Answering paragraph XVIII of said Bill of Complaint, deny that the amount of the rights of the several appropriators from Boise River is not now decreed by the court, or that no order has been issued for the distribution thereof, but on the contrary allege that the amount of the rights of the several appropriators from said Boise River was decreed by the District Court of the Third Judicial District on the 18th day of January, 1906, as heretofore alleged in said Bill of Complaint, and that said order and decree is now in force and effect, and governs the distribution of water to the several appropriators from said Boise River.

XV.

Answering paragraph XIX, admit that Elias Marsters and E. F. Lakin are respectively water commissioner and water master, having charge of the distribution of water from said Boise River. Deny that said Elias Marsters and E. F. Lakin, without authority of any decree or order of the court, have gone upon the Government diversion works, or have threatened to interfere with the Government head-

gates, or to break or unlock the locks on the Government headgates, or shut down the Government headgates, or put in effect the said decree of the District Court of 1906, or to deliver to certain canals water in excess of one miner's inch per acre, or to shut the water out of the Government Canal in violation of the decision of the Supreme Court, or without authority, in any manner whatsoever, save by the authority and in the manner hereinafter in this answer set forth.

XVI.

Answering paragraph XX of said Bill of Complaint, these defendants, and each of them, deny that there was an abundance of water flowing in Boise River at the time of the filing of said Bill of Complaint to supply the appropriations made in said decree and the complainant herein, and other appropriations made subsequent to said decree, upon the basis of six-tenths of a miner's inch per acre, or any other reasonable or proper duty of water, but, on the contrary, allege, that during the latter part of July and August of each year, there is not sufficient water in Boise River to give the appropriations contained in said decree six-tenths of an inch per acre.

XVII.

Defendants, and each of them, deny that the said Government Boise Project includes approximately 240,000 acres of land, or any other number of acres of land over and above 150,000 acres of land.

XVIII.

Answering paragraph XXII of said Bill of Complaint, deny that of this amount about eighty thou-

sand acres, or any other number of acres, has a partial water supply from other sources prior to the construction of the Government irrigation works, or is under contract to the Government for a supplemental supply of water from the Government works. And deny that about one hundred and sixty thousand acres, or any other number of acres, was entirely without water supply until the construction of the Government irrigation works, or has no other source of supply of water except from the Government works.

XIX.

As to the allegations contained in paragraph XXIII. of said Bill of Complaint, that upon 160,000 acres, about 2,000 homestead entrymen and land owners have settled with their families, and have cleared the land and put it under cultivation, and are growing crops thereon, which crops will be ruined and destroyed if they are deprived of water with which to irrigate the same, and that the settlers and entrymen are also dependent upon the water supply from the Government canal for necessary water for domestic purposes, and for the purpose of watering their stock, these defendants have not sufficient information or belief to enable them to answer, but demand strict proof thereof.

XX.

Answering paragraph XXIV of said Bill of Complaint, these defendants, and each of them, deny that six-tenths of a miner's inch per acre is a reasonable and proper duty of water during the whole of the

irrigation season, or that one miner's inch per acre during a portion of the irrigation season is an excessive or wasteful duty of water, but on the contrary allege that during a portion of an irrigation season, to-wit, from the commencement of the irrigation season to about the 20th day of July of each season, a reasonable and proper duty of water is one miner's inch per acre, and that for the remaining portion of an irrigation season a less amount than one miner's inch per acre is a reasonable and proper duty of water, but that six-tenths of an inch is too high a duty of water even for said portion of an irrigation season; and deny that under a reasonable and proper duty of water the crops on thousands of acres of land under the Boise project would be saved from loss and injury.

XXI.

Answering paragraph XXV of said Bill of Complaint, deny that any injury will be done to any entryman or to the United States, if said water supply is shut off.

XXII.

Answering paragraph XXVI of said Bill of Complaint, deny that said complainant will be damaged in the sum of \$10,000.00 per day, or any other sum or amount for each or every or any day that the water is shut out of said Government's canal, but specifically deny that the water has, at any time, been wrongfully and illegally, or wrongfully or illegally shut out of said Government's canal by these defendants, or either of them, or that defendants, or any

of them, wrongfully or illegally threatened to do so.

These defendants, and each of them, for a further and affirmative defense to said Bill of Complaint, allege as follows:

I.

That on the 18th day of January, 1906, the District Court of the Third Judicial District of the State of Idaho, in and for Canyon County, now the District Court of the Seventh Judicial District of the State of Idaho, in and for Canyon County, rendered its decree establishing the priorities of the different appropriators of the waters of Boise River, and the amount of water which each appropriator was entitled to, as follows, to-wit:

No.	Appropriator.	Inches.	Date of Priority.
1	Thomas Davis	110	June 1, 1864
2	Jacobs Canal Co.	1000	June 1, 1864
3	The Middleton Mill Ditch Co.	640	June 1, 1864
4	Thomas Andrews	165	June 1, 1864
5	T. C. Catlin and Polette Mace	143	June 1, 1864
6	T. C. Catlin	165	June 1, 1864
7	C. C. Havird	165	June 1, 1864
8	Pioneer Dixie Ditch Co..	1000	Sept. 1, 1864
9	Siebenberg Co-operative Ditch Co.	671	June 1, 1865
10	Allen V. Webster	60	June 1, 1865
11	J. F. Yaryan	33	June 1, 1865

12	James L. Graham, Frank N. Graham and Wil- liam Gilbert	220	June 1, 1865
13	Eureka Water Co.	1666	June 1, 1865
14	New Union Ditch Co. . . .	688	June 1, 1865
15	Boise Valley Irrigation Ditch Co.	2729	June 1, 1865
16	W. H. Ridenbaugh and A. Rossi	460	June 1, 1865
17	W. H. Ridenbaugh and A. Rossi	13290	June 1, 1865
18	The Denver and Idaho Land Co.	40	June 1, 1865
19	Marthat Bowman	144	June 1, 1865
20	Bird Bowman	320	June 1, 1865
21	G. W. Gess	145	June 1, 1865
22	Robert McGuire	160	June 1, 1865
23	C. W. Cooper	160	June 1, 1865
24	J. D. Rowland	120	June 1, 1865
25	Draper & Wells	197	June 1, 1865
26	Thomas J. Palmer	80	June 1, 1865
27	Noah W. Palmer	79	June 1, 1865
28	J. N. Tucker	350	June 1, 1865
29	Thomas Andrews	300	June 1, 1865
30	Joseph Perrault and Rich- ard Z. Johnson	2500	May 1, 1866
31	William P. Kennedy	130	June 1, 1866
32	Frank L. Leonard, Edna C. Leonard, J. S. D. Manville and Estate of Albert Shervin	175	June 1, 1866

33	Boise City Canal Co. . . .	1903	June 1, 1866
34	Franklin Ditch Co.	770	June 3, 1866
35	Canyon County Water Co.	3790	June 1, 1867
36	Martha E. McCarthy . . .	705	June 1, 1868
37	H. D. Goodman and Dora Goodman	185	June 1, 1868
38	T. T. Johnson	160	June 1, 1868
39	C. B. Ross, C. H. Allen, Edgar Dilley and W. H. Ross	427	June 1, 1868
40	S. S. Gray	70	June 1, 1868
41	John Mammon	90	June 1, 1869
42	Isaac Bedal	80	June 1, 1869
43	Frederick Oda	180	June 1, 1869
44	Prior Burnett	425	June 1, 1869
45	Pioneer Dixie Ditch Co..	1772	June 1, 1869
46	The Mason Creek Ditch Co.	1860	June 1, 1869
47	T. W. Boone	175	June 1, 1869
48	W. J. Hamming	130	June 1, 1870
49	The State of Idaho and others (Pioneer Canal)	1286	June 1, 1870
50	The Barber Lumber Co..	112	June 1, 1870
51	Thomas Andrews	65	June 1, 1870
52	T. C. Catlin and Polette Mace	393	June 1, 1871
53	Peter Meeves	90	June 1, 1871
54	The Middleton Mill Ditch Co.	1685	June 1, 1871
55	J. F. Yaryan	35	June 1, 1872
56	J. F. Yaryan	70	June 1, 1872

57	Mary G. Davis	220	June 1, 1872
58	Edward N. Hart	165	June 1, 1872
59	T. W. Boone	110	June 1, 1874
60	The Farmers' Co-operative Ditch Co.	500	June 1, 1875
61	Heirs of Edward and Ma- ry Clark	115	June 1, 1876
62	John Cecil	22	June 1, 1876
63	Thomas H. Aikens	260	June 1, 1877
64	W. H. Conway	45	June 1, 1877
65	Middleton Water Co. ...	5704	June 1, 1877
66	Joseph Perrault and Rich- ard Z. Johnson	10000	July 1, 1877
67	Nampa and Meridian Ir- rigation District	8500	May 1, 1878
68	John Mammon	210	June 1, 1878
69	Julia Mammon	168	June 1, 1878
70	Charles Allen	440	June 1, 1878
71	R. H. Stockton	220	June 1, 1878
72	New Dry Creek Ditch Co.	1566	June 1, 1879
73	D. Mumford	200	June 1, 1879
74	Smith Stockton	88	June 1, 1880
75	Isham Joplin	120	June 1, 1880
76	Joseph Goble	45	Oct.20, 1880
77	Franklin Ditch Co.	1380	Oct.29, 1880
78	Allen V. Webster	45	June 1, 1882
79	Susie Campbell	30	June 1, 1882
80	J. T. Barber	80	June 1, 1882
81	Sonora Joplin	170	June 1, 1882
82	S. W. Hutchinson	22	June 1, 1882
83	Johnson	22	June 1, 1882

84	Andrew J. Joplin	143	June 1, 1882
85	James L. Graham	110	June 1, 1882
86	The Farmers' Co-opera- tive Ditch Co.	1000	June 1, 1883
87	Francis M. Joplin	45	June 1, 1883
88	W. A. Black	600	June 1, 1883
89	Eureka Ditch Co.	1085	Nov. 9, 1883
90	Pioneer Irrigation Dist..	2655	June 1, 1884
91	Riverside Irrigation Dis- trict	1000	June 1, 1884
92	The Settlers' Canal Co...	4953	Oct.17, 1884
93	New Dry Creek Ditch Co.	761	June 1, 1886
94	Thomas Davis	670	June 1, 1886
95	William C. Young, Lizzie Young and Estella Young	200	Jan.23, 1887
96	American Ditch Associa- tion	2390	Oct. 1, 1887
97	New Dry Creek Ditch Co.	393	June 1, 1888
98	A. V. Linder	200	June 1, 1888
99	Levi Smith	65	June 1, 1888
100	Charlotte Calhoun	70	June 1, 1888
101	E. J. Linder	73	June 1, 1888
102	Lizzie Everett	60	June 1, 1888
103	Jesse Wilson	70	June 1, 1888
104	Thomas Andrews	45	June 1, 1888
105	The Farmers' Co-Op. Ditch Co.	2500	July 1, 1888
106	Nampa & Meridian Irrig. District	18542	Aug.20, 1888
107	Charles H. Miller.	3	May 1, 1889

108	Loomis L. Hoseley	1	May 1, 1889
109	Steve Utter, John Utter & C. B. Taylor	120	May 1, 1889
110	South Boise Mutual Irrig- ation Co.	300	May 1, 1889
111	Estate of J. H. Gallagher	147	May 1, 1889
112	Annie H. Togarty	21½	May 1, 1889
113	Grace Call	5	May 1, 1889
114	Samuel H. Canfield	11½	May 1, 1889
115	Sonora Joplin	3	June 1, 1889
116	Sonora Joplin	60	June 1, 1889
117	Pioneer Irrigation Dist. .	10000	Sept. 1, 1890
118	W. H. Conway	110	June 1, 1891
119	Thomas Davis	27	June 1, 1891
120	The Middleton Ditch Co.	850	June 1, 1891
121	Thomas Andrews	175	June 1, 1891
122	The Settlers' Canal Co. .	3572	June 1, 1891
123	Thomas H. Aikens	40	June 1, 1891
124	Riverside Irrig. District.	4000	May 1, 1893
125	R. H. Stockton	88	June 1, 1894
126	Farmers Union Ditch Co.	5500	July 2, 1894
127	Charles Rim & Jane Keoh	50	May 1, 1895
128	Mathew Casey	53	July 1, 1895
129	The Farmers Co-op. Ditch Co.	4175	July 1, 1896
130	Riverside Irrig. District.	1000	Oct. 1, 1899
131	New York Canal Co.	10955	Mar. 23 1900
132	Canyon Ditch Co.	500	May 17, 1900
133	Riverside Irrig. Dist. . . .	3500	June 1, 1901
134	Canyon Ditch Co.	277	Oct. 25, 1901
135	Pioneer Irrig. Dist.	2817	Apr. 1, 1904

II.

That the total amount of water decreed as aforesaid was 158,235 miners' inches or 3164.7 second feet.

III.

That all said rights so decreed are prior and superior to the rights of the United States Government as alleged in said Bill of Complaint.

IV.

That the said suit of the Farmers' Co-Operative Ditch Company, a corporation, vs. Riverside Irrigation District, a corporation, et al., in which said decree was entered as aforesaid, was commenced by the filing of an Amended Complaint on the 20th day of August, 1902, at 4 o'clock P. M., in the District Court of the Third Judicial District of the State of Idaho, in and for Canyon County, (now the District Court of the Seventh Judicial District of the State of Idaho, in and for Canyon County), and that at said time, and for a long time thereafter, the above named complainant had no right, title or interest in or to the use of any of the waters of Boise River.

V.

That during the early part of the irrigation season there is an abundance of water in Boise River to supply all the appropriators named in said decree with water to the amount so named, and that each year during the latter part of July, or in the early part of August, the water of Boise River becomes insufficient to supply the appropriators named in

said decree with the amount so named, and remain so during the remainder of said season, and that ever since said decision of the Supreme Court of the State of Idaho, and for four years last past, there was, and is, a general understanding among the attorneys in the case of the Farmers' Co-Operative Ditch Company, a corporation, vs. the Riverside Irrigation District, a corporation, et al., that the said decree as above set forth should be followed each year until such times as the waters of Boise River become insufficient to supply the appropriators named in said decree, and that when said waters of the Boise River become insufficient to supply the said appropriators of Boise River in accordance with the terms of said decree, an appropriator who has a late appropriation came into said district court, the court which has the jurisdiction of said action, asking that a temporary order be made by said district court for a higher duty of water than that named in said decree during the remainder of the irrigation season for that specific year; and that each year during the four years last past, an appropriator who is a late appropriator under said decree of the waters of Boise River, has filed a petition in the said district court, during the latter part of July or the early part of August, and on such petition has obtained a temporary order from said district court, establishing a higher duty of water than that established in the decree above mentioned during the remainder of such irrigation season or until a further order of the court, which temporary order had for its basis a certain per cent or

part of the water allotted under the original decree. That during each irrigating season during said time, and in accordance with said understanding, as above alleged, the Water Commissioner and Water Master of Boise River distributed the water of Boise River under said decree and until such times when they were directed to do differently by said temporary order. That in accordance with said understanding, the New York Canal Company, Limited, one of the defendants and cross-complainants in the said suit of the Farmers' Co-Operative Ditch Company vs. Riverside Irrigation District, et al., filed in the early part of July, 1913, a petition asking for a temporary order, on which petition a notice was served on the different parties in said action, which notice is described as follows, towit:

*In the District Court of the Seventh Judicial District
of the State of Idaho, in and for Canyon County.*

FARMERS' CO-OPERATIVE DITCH COMPANY,
Plaintiff,

vs.

RIVERSIDE IRRIGATION DISTRICT, ET AL.,
Defendants.

NOTICE.

To the above-named Plaintiff and to all of the above-named Defendants and their Attorneys, with the exception of the New York Canal Company, Ltd., which Company is making the application herein.

You and each of you will please take notice that the defendant, the New York Canal Company, Limited, will, on the 18th day of July, 1913, at the hour

of 2 o'clock, P. M. of said day, or as soon thereafter as counsel may be heard, at the Chambers of the Honorable E. L. Bryan, Judge of the Seventh Judicial District of the State of Idaho, in and for the County of Canyon, at Caldwell, Idaho, or in open court on said day, move the said Judge of the above entitled court to make an order authorizing and directing the Water Commissioner of the Third District of Idaho, during the remainder of the irrigation season of 1913, to distribute the water of the Boise River on the basis of six-tenths of an inch per acre for each acre of land watered from said river.

Said motion will be made upon the pleadings, files and record in the said cause, and affidavits filed, or hereafter to be filed.

CAVANAUGH, BLAKE & MACLANE,
Attorneys for defendant, New York Canal
Company, Limited,
Residence, Boise, Idaho.

Dated July 11th, 1913.

and that on or about the 18th day of July, 1913, the said District Court of the Seventh Judicial District of Idaho, in and for the County of Canyon, made a temporary order on said petition, which order is as follows, to-wit:

*In the District Court of the Seventh Judicial District
of Idaho, in and for the County of Canyon.*

FARMERS CO-OPERATIVE DITCH COMPANY,
Plaintiff,

vs.

RIVERSIDE IRRIGATION DISTRICT, ET AL.,
Defendants.

ORDER.

Now on this 18th day of July, 1913, on the application of the New York Canal Company, Limited, one of the defendants and cross-complainants in the above entitled action, before the undersigned, Judge of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Canyon, came regularly on for hearing the evidence upon the part of said defendant and cross-complainant, New York Canal Company, Limited, and no evidence being offered by the plaintiff, nor any of the other defendants and cross-complainants, the undersigned Judge finds that all of the facts set forth in said application are true, and that the prayer of said application should be granted.

It is, therefore, ordered that from and after the date hereof and during the remainder of the irrigation season of 1913, the duty of water be, and the same is hereby fixed at six-tenths of a miner's inch per acre, measured at the point of diversion from Boise River, the same being six-tenths of the amount of water allotted under the original decree herein, and the Water Commissioner of the Third District of Idaho is hereby directed during the remainder of the irrigation season of 1913, to distribute the waters of Boise River in accordance to the priorities heretofore found by the Court in the above entitled cause, giving to each of said parties the proportion above specified, of the amount allotted under the original decree, namely, six-tenths of the original decreed amounts, being in effect for all lands a duty

of water of six-tenths of a miner's inch per acre measured at the point of diversion. The Capital Water Co. is excepted from this order.

Dated July 18th, 1913.

ED L. BRYAN,
District Judge.

That the amount of water flowing in Boise River at the time of the acts complained of in complainant's Bill of Complaint did not exceed.....second feet, to any of which the said complainant was not entitled.

VI.

That Section 3269, Revised Codes of Idaho, provides as follows:

"Sec. 3269. There shall be appointed one water commissioner for each of the water divisions by this chapter created, who shall be appointed by the Governor, with the consent of the Senate, and who may be removed for cause. Said water commissioners shall each be appointed to hold office for a period of six years, or until their successors are appointed, and shall have qualified, one commissioner retiring and his successor being appointed each odd numbered year; *Provided*, That the present commissioners shall hold office until the expiration of their respective terms. Such water commissioners shall possess such theoretical knowledge of the science of hydraulics as will enable them to supervise the construction of such measuring devices as may be necessary to place in any ditch, canal or

stream for the proper measurement of the water. They shall be acquainted with the streams of their divisions and shall be capable of instructing the water master who may be placed in charge of such streams in all matters in relation to the distribution of the water of such streams in accordance with the priorities of the rights of those using such waters."

That Section 3270, Revised Codes, provides as follows:

"Sec. 3270. Each commissioner shall reside in the water division for which he is appointed. The commissioner of each water division shall have immediate direction and control of the acts of the water masters, and of the distribution of water from all the streams to the canals diverting therefrom in his division, and shall perform such duties as shall devolve upon him as a member of the Board of Irrigation. He shall also, under the general supervision of the State Engineer, execute the laws relative to the distribution of water in accordance with the rights of priority of appropriation. He shall also, when so directed by the State Engineer, receive proof of completion, and make inspection and examination as provided in section 3258 of this title, of works for the diversion and application of water under any permit, where the point of diversion of said works is located within the boundaries of his division; and he shall also, when so directed by the State Engineer, receive

proof of the beneficial use of waters diverted under the provisions of this title in cases where the majority of the lands benefited by the diversion works in question lie within the boundaries of his division.”

That Section 3274, Revised Codes of Idaho, as amended by House Bill No. 68, Tenth Session Legislature State of Idaho, provides as follows:

“Sec. 3274. The Board of Irrigation shall divide the State into water districts in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district; *Provided*, That any streams or water supply, when the distance between the extreme points of diversion thereon is more than forty (40) miles may be divided into two (2) or more water districts; and *Provided*, That any stream tributary to another stream may be constituted into a separate water district when the use of the waters therefrom does not affect or conflict with the rights to the use of the waters of the main stream; and *Provided*, That any stream may be divided into two (2) or more water districts, irrespective of the distance between the extreme points of diversion, where the use of the waters of such stream by appropriators in one district does not affect or conflict with the use of the waters of such stream by appropriators outside such district; and, *Provided*, That this section shall not apply to streams or water supplies whose priorities of

appropriation and use have not been adjudicated by the courts having jurisdiction thereof.”

That Section 3275, Revised Codes, as amended by House Bill 68, Tenth Session of the Legislature of the State of Idaho, provides as follows:

“Section 3275. There shall be held on the first Monday of March of each year, commencing at 2 o'clock P. M., a meeting of all persons owning or having the use of any adjudicated right, in the waters of the stream or water supply comprising such district. Such meeting shall be held at some place within the water district, convenient to a majority of those entitled to vote thereat, which place shall be designated by the water commissioner of the district, and he shall, between January first and February first of each year, file such designation with the county auditor of the county or counties within which such water district is situated and shall notify by mail all persons, companies or corporations known by him to own or claim the use of the waters of such district, and should said water commissioner fail to file such designation by February first, the district judge of the district within such water district or portion thereof, is situated shall, upon application of some interested person, designate the place of holding such meeting, and in case the first Monday in March has passed, such district judge may also designate the time of holding such meeting.

At such meeting there shall be elected a water master for such water district, and such other regular assistants as such meeting shall deem necessary, and such meeting shall, prior to the election of such water master and assistants, fix the compensation to be paid them, such compensation not to exceed four dollars (\$4.00) per day, during the time actually engaged in the performance of their duties. At such meeting each person present owning or having the use for the ensuing irrigation season of any adjudicated right equal to ten (10) inches of water in the stream or water supply comprising such water district shall be entitled to one (1) vote. Such meeting shall choose a chairman and secretary and shall determine the manner and method of electing water masters and assistants. Within five (5) days after such meeting the chairman and secretary shall forward a certified copy of the minutes of such meeting to the Water Commissioner of the district; *Provided*, That a corporation shall be considered a person for the purpose of this section and shall cast its vote by some one to be designated by the corporation; and *Provided*, That each stockholder in said corporation shall be entitled to as many votes as he shall have units of ten miners' inches of water, regularly adjudicated, in the stream or water supply comprising such water district; and *Provided*, That should said meeting not be held or not choose a water master, or not fix the com-

pensation thereof, then the Water Commissioner of the district may appoint such water master and fix his compensation not exceeding four dollars (\$4.00) per day.

The Water Commissioner may, at any time, remove any water master within his division for failure to perform his duty as such watermaster, upon complaint in that respect being made to him in writing by any person owning or having the right to the use of an adjudicated right in such district, and the Water Commissioner may appoint a successor for the unexpired term.

Before entering upon the duties of his office, said water master shall take and subscribe an oath before some officer authorized by the laws of the State to administer oaths, to faithfully perform the duties of his office, and shall file with the Clerk of the District Court in the county in which said water master resides, said oath and his official bond in the penal sum of five hundred dollars (\$500.00), with not less than two sureties, to be approved by the judge of the probate court of the county in which he resides, and conditioned for the faithful discharge of the duties of his office."

That Sec. 3276, Idaho Revised Codes, provides as follows:

"Section 3276. All water masters shall make reports to the Water Commissioner of their division as often as may be deemed necessary by

said commissioner. Said reports shall contain the following information: The amount of water necessary to supply all the ditches, canals and reservoirs of the district; the amount of water actually coming into the district to supply such ditches, canals or reservoirs, whether such supply is on the increase or decrease; what ditches, canals and reservoirs are at times without their proper supply, and the probability as to what the supply will be during the period before the next report will be required, and such other information as the Water Commissioner of the division may suggest. Said Water Commissioner shall carefully file and preserve such reports, and shall from them ascertain what ditches, canals and reservoirs are, and what are not, receiving their proper supply of water, and if it shall appear that in any district of that division, any ditch, canal or reservoir in another district as ascertained from his register, he shall at once order such post-date ditch, canal or reservoir shut down, and the water given to the elder ditch, canal or reservoir, his orders being directed at all times to the enforcement of priority of appropriation, according to his tabulated statement of priorities, to the whole division, and without regard to the district within which the ditches, canals or reservoirs may be located. The reports of water masters to the Water Commissioners of irrigation shall be filed and kept in the office of the State Engineer."

That Section 3277, Revised Codes, as amended by House Bill 68, Tenth Session Legislature of the State of Idaho, provides as follows:

“Section 3277. It shall be the duty of said water master to distribute the waters of the public stream, streams, or water supply, comprising his water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, under the direction of the Water Commissioner of his district, the headgates of ditches heading from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply; *Provided*, That any person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated right therein, shall, for the purpose of distribution, during the scarcity of water, be held to have a right subsequent to the adjudicated rights in such stream or water supply, and the water master shall close all headgates of ditches having no adjudicated right if necessary to supply adjudicated rights in such stream or water supply.”

VII.

That Elias Marsters, one of the above named defendants, was, during the month of July, 1913, and

ever since has been, and now is, the duly appointed, qualified and acting water commissioner of Water Division No. 3 of the State of Idaho.

VIII.

That E. F. Lakin, one of the above named defendants, was, during the month of July, 1913, and ever since has been and now is, the regularly elected, qualified and acting water master of the Boise River.

IX.

That pursuant to the authority granted them by the said statutes above mentioned, and decrees and order of the said District Court of the State of Idaho, the said Elias Marsters and E. F. Lakin are, and have been during the irrigation season of 1913, distributing the waters of the Boise River to the parties entitled thereto.

X.

That the granting of an injunction in this case enjoining these defendants from administering and distributing the water of said Boise River, and from so regulating the gates of said Government diversion works as to allow the proper amount of water to the various appropriators, above mentioned, superior in time and right to the said complainant, would work great and irreparable injury against all of said appropriators.

And Further Answering, and for a Second Affirmative Defense, These Defendants Say:

I.

That the said Bill of Complaint fails to allege any matter of equity entitling the plaintiff to the relief prayed for therein.

II.

That the said Bill of Complaint shows upon its face that this court is without jurisdiction of the subject matter of this action.

III.

That the said Bill of Complaint fails to allege facts sufficient to constitute a cause of action against said defendants, or either of them:

FIRST—For the reason that it fails to allege the appropriators of the waters of Boise River whose appropriations are prior in time to said plaintiff and the amount to which each is entitled.

SECOND—For the reason that said Bill of Complaint fails to allege that the complainant is entitled to the water so turned out of the said Government works ahead of and prior to and under rights and appropriations superior to those appropriators to whom said defendants are, and were, at the time of the commission of the acts alleged in said Bill of Complaint, delivering and distributing said water; and fails to allege the amount of water to which the complainant is so entitled.

THIRD—For the reason that said Bill of Complaint fails to allege the amount of water in Boise

River to which the complainant was entitled under its rights of appropriations ahead of and prior to other appropriators from Boise River, at the time of the commission of the acts complained of in said Bill of Complaint.

FOURTH—For the reason that said Bill of Complaint fails to allege that said complainant was entitled to divert the amount of water, or any of the water which it was diverting at the time of the commission of the acts complained of in said Bill of Complaint.

IV.

That said Bill of Complaint is defective, in that it does not join as parties defendant all other appropriators of the waters of Boise River. That all the parties named in paragraph 1 of the first affirmative answer hereof should be made parties defendant in this suit for the reason that they were parties to the said action of Farmers Co-operative Ditch Company, Plaintiff, vs. Riverside Irrigation District, et al., Defendants, mentioned in said Bill of Complaint, and are interested in the subject matter of this suit.

V.

That the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Canyon, in said suit of Farmers Co-operative Ditch Company, Plaintiff, vs. Riverside Irrigation District, et al., Defendants, mentioned in complainant's Bill of Complaint, now has, and has had, for four years last past, jurisdiction of the subject matter of this suit, and in said suit said district court

now holds, and has had, during all of said time, jurisdiction of all the water flowing in Boise River, at the time of the commission of the acts complained of in complainant's Bill of Complaint; which said suit has been set by said District Court for hearing and determination on January 5, 1914.

Having Thus Made Full Answer to All the Matters and Things Contained in the Bill, These Defendants Pray:

FIRST—That all proceedings be stayed until the said District Court which had the jurisdiction of the subject matter of this suit prior to this Court, shall have determined the rights of the parties hereto.

SECOND—That the complainant take nothing by this action, and that the defendants be hence dismissed with their costs.

J. H. PETERSON,
Attorney General.

J. J. GUHEEN.

T. C. COFFIN.

Of Counsel:

SCATTERDAY & VAN DUYN.

THOMPSON & BUCKNER.

HERBERT WING.

State of Idaho,
County of Ada,—ss.

Personally appeared before the undersigned authority, T. C. Coffin, one of the attorneys for the

defendants in the above cause, who, being duly sworn, deposes and says that he is one of the attorneys for the above named defendants in the above cause, and that the matters and things contained in the foregoing answer are true.

That he makes this affidavit on behalf of said defendants for the reason that both of said defendants are at this time absent from Boise City, State of Idaho, where this affiant resides.

T. C. COFFIN.

Subscribed and sworn to before me this 1st day of December, 1913.

(Seal)

I. W. HART,

Clerk of the Supreme Court of the State of Idaho.

Endorsed: Filed Dec. 1, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States, in and for
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,

VS.

ELIAS MARSTERS and E. F. LAKIN,

Defendants.

SUPPLEMENTAL BILL OF COMPLAINT.

Permission of the court having been first asked and received, the Complainant files this its Supplemental Bill of Complaint, and alleges:

I.

That after making the threats described in the Bill of Complaint herein, the Defendants, Marsters and

Lakin, and with them certain other persons employed by them, and acting under their direction and control, on the 11th day of July, 1913, went to the said Section Three (3), Twp. Two (2) North, Range Three (3) East, B. M., the reserved public lands of the United States, withdrawn from all forms of entry and reserved and set aside under the first form of reservation authorized by the said Reclamation Act of June 17, 1902, and wrongfully and without any right, authority or permission, and without any order or decree of court, went upon said withdrawn lands of the United States and upon the Diversion Dam, headgates, main canal and other irrigation works of the United States, constructed on said lands, and took possession of said works and with force and violence broke the locks and chains on said headgates of the United States and turned out of said canal the water included in the Complainant's said water appropriation described in the Bill of Complaint herein, and wrongfully and illegally and without any right or authority, kept possession of said irrigation works and deprived the Complainant of the use and benefit of said reserved public lands of the United States and of said dam, headgates, canal and irrigation works, and of said water and water appropriation from said 11th day of July, 1913, until the end of the irrigation season, to-wit, October 31, 1913, to the great damage of the Complainant.

II.

That said dam, head-works, and canal cost and are reasonably worth more than One Million (\$1,000,-

000) Dollars, and that the reasonable rental value of said irrigation works is Two Hundred (\$200.00) Dollars per day for each day from July 11th to October 31st, inclusive.

III.

That, pending the formal opening of said Boise Project, the Complainant has made contracts with the settlers, entrymen and land owners of said Government Boise Project for furnishing water to said settlers, entrymen and land owners for irrigation and domestic purposes to enable them to raise crops and secure water for stock and domestic purposes, and under said contracts said settlers, entrymen and land owners have agreed to pay for such water at the rate of forty (40c) cents per acre foot for the season of 1913, and that by the said trespass of the Defendants, and their aforesaid wrongful and illegal acts, the Complainant has been deprived of the use of said water and the rental value thereof and the receipts from said water rentals, to the great damage of Complainant, and that the Complainant has been damaged in the loss of said water rentals in the sum of Fifteen Thousand Dollars.

IV.

That approximately eighty thousand acres of land were actually being irrigated and farmed on said Boise Project during the season of 1913, and that about one-half thereof is public land of the United States and the property of the United States, which has been entered under the said Reclamation Act, but title to which has not yet passed from the United

States, and that by said wrongful and illegal acts of the Defendants in shutting off the said water, the said lands of the Complainant have been damaged and injured in the value thereof to the amount of Ten Thousand (\$10,000) Dollars.

V.

That in connection with the construction of said Boise Project and for use in the construction of the Arrowrock Dam and such commercial purposes and other purposes as can be incidentally supplied in connection therewith, the United States has constructed an electrical power plant at the said Government Diversion Dam and installed electrical machinery therein at a cost for said plant, machinery and installation of approximately Two Hundred Thousand Dollars, and has appropriated and filed upon the waters of Boise River under date of June 15th, 1909, for power purposes at said power plant and has completed said plant and diverted said waters for power purposes and applied the same to beneficial use in the generation of electrical power during the years 1912 and 1913 and is now and was during all the times mentioned in this Supplemental Complaint operating said power plant for the generation of electrical energy for use in the construction of the Arrowrock Dam and for commercial purposes.

VI.

That the water used at said power plant for power purposes returns to Boise River immediately below said Government Diversion Dam and is then avail-

able for the use of other appropriators, and that said use for power purposes does not in any way interfere with the use of said water by any other appropriator.

VII.

That wantonly and wilfully and without any use or benefit to any person whatever, the Defendants took possession of the upper portion of the said Government canal about a mile in length from the head-gates thereof down to those certain waste gates thereon known as the Barber Wasteway, and ran through said portion of said canal and around said Government power plant a part of the water supplied to the lower canals on Boise River and wasted the same back into Boise River at said Barber Wasteway and thus deprived the Complainant of the use thereof at its said power plant for power purposes and greatly interfered with the operation of said power plant and caused the loss of power at said plant to the great damage of the Complainant, and that the Complainant has been damaged thereby in the loss of power and in interference with the operation of its power plant, in the sum of One Thousand Dollars.

VIII.

That there is no decree or order of Court in effect determining the extent of the rights of any of the appropriators from Boise River, and that Defendants threaten to and will proceed in the same illegal manner in 1914 as in 1913, and that great and irre-

parable damage will be done to the Complainant and the several thousand water users under its said canal, unless restrained by an order of this court.

Wherefore, Complainant prays:

That the Defendants, their agents, subordinates, and employees and all persons acting under their direction and control, be forever enjoined and restrained by the order of this Court from going upon said reserved lands of the United States, or any part of said dam, headworks, power plant, headgates, canal or other irrigation works, or property of the United States, and that Defendants be forever enjoined and restrained from breaking, injuring or destroying any part thereof, or any locks, chains or other devices thereon, or in any way interfering with any of said works or the operation thereof.

That the Complainant have judgment against the Defendants for the damage done to the Complainant and suffered by the Complainant from Defendants' said wrongful and unlawful acts, to-wit, the sum of Forty-eight Thousand Dollars, and for costs of suit and for such other and further relief as to the court shall seem equitable and just.

C. H. LINGENFELTER,

United States Attorney for the District of Idaho.

B. E. STOUTEMYER,

Attorney U. S. R. S.,
Boise, Idaho.

Permission of the court to file the foregoing Supplemental Complaint is hereby given, Defendants to plead within 20 days after service of Supplemental Complaint.

F. S. DIETRICH,
Judge.

November 1st, 1913.

State of Idaho,
County of Ada,—ss.

C. H. Lingenfelter, being first duly sworn, on oath deposes and says:

That he is agent of the United States and U. S. Attorney for the District of Idaho, and makes this verification for and on behalf of the United States, and is authorized so to do.

That he has read the foregoing Supplemental Bill of Complaint, knows the contents thereof and believes the facts therein stated to be true.

C. H. LINGENFELTER.

Subscribed and sworn to before me this 1st day of November, 1913.

A. L. RICHARDSON,
(Seal) Clerk.

Service by delivery of copy acknowledged this 1st day of November, 1913.

J. H. PETERSON,
Attorney for Defendants.

Endorsed: Filed Nov. 1, 1913. A. L. Richardson,
Clerk.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
VS.
ELIAS MARSTERS and E. F. LAKIN,
Defendants.

ANSWER TO SUPPLEMENTAL COMPLAINT.

These defendants, reserving all manner of exceptions that may be had to the many uncertainties and imperfections of the Supplemental Bill of Complaint, come and answer thereto, or to so much thereof as they are advised is material to be answered to, and say:

I.

Defendants, and each of them, deny that either of them made any threats, or that, after making any threats, if any, as described in the Bill of Complaint herein, that the defendants, Marsters and Lakin, or Marsters or Lakin, or with them any other person or persons employed by them, and acting under their direction or control, or otherwise, on the 11th day of July, 1913, or at any other time, or at all, wrongfully or without any right or authority or permission, or without any order or decree of court, went to said Section 3, Township 2 North of Range 3 East of the Boise Meridian, the reserved public lands of the United States, withdrawn from all forms of entry and reserved and set aside under the first form of the reservation authorized by the said Reclamation Act of June 17, 1902, or that they, or either of them, or

any person under their employ or acting under their or either of their direction or advice or control, wrongfully or without any right, authority or permission, or without any order or decree of court, went upon said withdrawn lands of the United States, or upon the diversion dam, headgate, or headgates, main canal, or other irrigation work or works of the United States, constructed on said land, or took possession of said works with force, or violently broke the locks and chains on said headgate or headgates of the United States, or turned out of said canal the water included in complainant's said water appropriation described in the Bill of Complaint therein, or that they, or either of them, wrongfully or illegally or without any right or authority, kept possession of said irrigation work or works, or deprived the complainant of the use or benefit of the said reserved public lands of the United States, or of said dam, headgate, or headgates, canal or irrigation work or works, or of any water to which the complainant was lawfully entitled under any water appropriation from Boise River, from the said 11th day of July, 1913, until the end of the irrigation season, or any other time, or at all, to the great, or any, damage of the complainant, and deny that any illegal or wrongful acts of the defendants, or either of them, resulted in great, or any, damage to the complainant.

II.

Answering paragraph II of complainant's supplemental Bill of Complaint, said defendants, and each

of them, state that they have no knowledge, information or belief sufficient to enable them to answer the allegation that said dam, headgates and canal cost, and are reasonably worth more than one million dollars, and that the reasonable rental value of said irrigation works is \$200.00 per day for each day from July 11th to August 31st, inclusive, but demand strict proof thereof.

III.

Answering paragraph III of Complainant's supplemental Bill of Complaint, these defendants, and each of them, state that they have no knowledge, information or belief sufficient to enable them to answer the allegations contained in paragraph III of said Bill of Complaint, and placing their denial on that ground, deny that, pending the formal opening of said Boise Project the complainant has made any contracts with any settlers, entrymen, or land owners, of said Government Boise Project for furnishing water to said, or any, settlers, entrymen or land owners, for irrigation or domestic purposes to enable them to raise any crops or secure water for stock or domestic purposes, or any purpose, or that under said contracts, or any contracts, said, or any, settlers, entrymen or land owners have agreed to pay for such water or any water at the rate of 40c or any other sum per acre foot for the season of 1913, or that by the said, or any, trespass of the defendants, or either of them, or that the aforesaid wrongful or illegal, if any, acts the complainant has been deprived of the use of said, or any, water to which the com-

plainant is entitled, or that the rental value or the receipts of the said, or any, water rental to the great or any damage of the complainant, or that the complainant has been damaged in the loss of said or any water rental in the sum of \$15,000.00 per day, or any other sum or amount per day for water rental to which the said complainant is entitled.

IV.

Answering paragraph IV of complainant's supplemental Bill of Complaint, these defendants, and each of them, state that they have no knowledge, information or belief sufficient to enable them to answer the facts alleged in the allegations contained in paragraph IV of complainant's supplemental Bill of Complaint, and placing their denial on that ground, deny that approximately 80,000 acres of land, or approximately any other number of acres of land, were, or are, actually being irrigated or farmed on said Boise Project during the season of 1913, or that about one-half, or any other part thereof, is public lands of the United States, or the property of the United States which has been entered under the Reclamation Act, or that title to which, or any part thereof, has not yet passed from the United States, or that any wrongful or illegal act or acts of the defendants, or either of them, in shutting off the said water, the said lands, or any lands, of the complainant have, or have been, damaged or injured in the value thereof to the amount of \$10,000.00, or any other sum or amount at all.

V.

Answering paragraph V of complainant's supplemental Bill of Complaint, these defendants, and each of them, state that they have no knowledge, information or belief sufficient to enable them to answer the allegations alleged in paragraph V of said supplemental Bill of Complaint, and placing their denial on that ground, deny that in connection with the construction of said Boise Project, or for use in the construction of the Arrowrock Dam, or such commercial purpose or purposes, or any other purpose as can be incidentally supplied in connection therewith, the United States has constructed an electrical power plant at the said Government diversion dam, or installed electrical machinery therein at a cost of, for the said plant, machinery and installation, approximately \$200,000.00, or any other sum or amount, or at a cost for said plant, machinery or installation of any sum whatever, or that the complainant herein has appropriated or filed upon the waters of Boise River under date of June 15, 1909, or under any other date, or at all, for power for any purposes for said power plant, or at any other place, or has completed said plant or any plant or diverted any water for power purposes, or supplied the same to beneficial use in the generation of electrical power during the year 1912 and 1913 or during the years 1912 or 1913, or at any other time, or is now, or was, during the times mentioned in this supplemental Bill of Complaint, operating said power plant with water to which the said complainant is entitled, at the time of filing the supplemental complaint herein, for the

generation of electrical energy for use in the construction of Arrowrock Dam, or for commercial or any purposes.

VI.

Answering paragraph VI of complainant's supplemental Bill of Complaint, deny that at the time of the filing of said complaint that the complainant was entitled to any water in Boise River, or that the water used in said power plant for power purposes returned to Boise River immediately below said Government Dam, or is then available for the use of other appropriator or appropriators, or that said use for power purposes does not in any way interfere with the use of said water by other appropriators.

VII.

Answering paragraph VII of complainant's supplemental Bill of Complaint, these defendants, and each of them, deny that they wantonly or willingly or without any use or benefit to any person whatever, took possession of the upper portion of the said Government canal about a mile in length from the said headgate, or headgates thereof, down to those certain waste gates thereon known as the "Barvi Waste Gate," and ran through said portion of said canal, or around said government power plant, a part of the water supplied to the lower canal on Boise River, or wasted the same back into Boise River at said Barvi Waste Gate, or that the defendants, or either of them, wantonly or without any use or benefit to any person, deprived the complainant of the use of any water at its said power plant for power purposes

or greatly interfered with the operation of said power plant, or caused the loss of power in said plant to the great, or any, damage of the complainant, or that by any wrongful, illegal or wanton act or acts of the defendants, or either of them, the complainant has been damaged in the loss of power or in the interference with the operation of its power plant in the sum of \$1,000.00 or in any other sum at all.

VIII.

Answering paragraph VIII of complainant's supplemental Bill of Complaint, these defendants, and each of them, deny that there is no decree or order of court in effect, determining the extent of the rights of any of the appropriators on Boise River, or that the defendants, or either of them, threaten to, or will proceed in any illegal manner in 1914, or that they have at any other time proceeded in an illegal manner, or that on account of any illegal or wrongful act or acts of the defendants, or either of them, the complainant, or any of the water users under its said canal, have suffered great, or any, great or irreparable, or any, damage, or that they, or any of them, will, unless restrained, suffer great or irreparable or any damage, unless restrained by order of this court.

These defendants, and each of them, for a further and affirmative defense to said supplemental Bill of Complaint, allege as follows:

I.

To avoid repetition, said defendants, and each of

them, hereby refer to and incorporate as a part of this affirmative defense, paragraphs I, II, III, IV, V, VI, VII, inclusive, of defendants' further and affirmative answer to said Bill of Complaint, and by reference make the facts alleged in each and every paragraph thereof a part of this answer as fully as though the same were set out in full in this answer, which said paragraphs are hereby referred to and made a part hereof.

II.

To avoid repetition, said defendants, and each of them, hereby refer to and incorporate as a part of this affirmative defense, paragraphs I, II, III, IV, V, inclusive, of defendants' second affirmative defense in the answer filed to the original Bill of Complaint, and by reference make the facts alleged in each and every paragraph thereof a part of this answer as fully as though the same were set out in full in this answer, which said paragraphs are hereby referred to and made a part hereof.

Having Made This Full Answer to all the matters and things contained in said supplemental Bill of Complaint, these defendants pray:

1. That all proceedings be stayed until the said district court which had the jurisdiction of the subject matter of this suit prior to this court, and still holds said jurisdiction, shall have determined the rights of the parties thereto.

2. That the complainant take nothing by this ac-

tion, and that the defendants and each of them be here dismissed with their costs.

J. H. PETERSON,

Attorney General.

J. J. GUHEEN.

T. C. COFFIN.

Of Counsel:

SCATTERDAY & VAN DUYN.

THOMPSON & BUCKNER.

HERBERT WING.

State of Idaho,

County of Ada,—ss.

Personally appeared before the undersigned authority, T. C. Coffin, one of the attorneys for the defendants in the above cause, who, being duly sworn, deposes and says that he is one of the attorneys for the above named defendants in the above cause, and that the matters and things contained in the foregoing answer are true.

That he makes this affidavit on behalf of said defendants for the reason that both of said defendants are at this time absent from Boise City, State of Idaho, where this affiant resides.

T. C. COFFIN.

Subscribed and sworn to before me this 1st day of December, 1913.

(Seal)

I. W. HART,

Clerk of the Supreme Court of Idaho.

Endorsed: Filed Dec. 1, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
VS.
ELIAS MARSTERS and E. F. LAKIN,
Defendants.

STATEMENT OF EVIDENCE ON APPEAL.

This cause came regularly on to be heard on the 10th day of June, 1915, before Honorable Frank S. Dietrich, Judge of the above entitled court, B. E. Stoutemyer, Esq., and James L. McClear, Esq., appearing for complainant, and E. G. Davis, Esq., and Herbert Wing, Esq., and Thompson and Buckner, Esqs., for defendants. Whereupon the following proceedings were had, to-wit:

MR. DAVIS: May we have the record show that an objection was made to the taking of any testimony, on the ground that this case involves the adjudication of water rights and priorities on the Boise River, this question having already been taken jurisdiction of by the District Court of the Seventh Judicial District of Idaho, and that the objection was overruled and that an exception is noted thereto?

THE COURT: Yes.

Lorin T. Kinert, being called and duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination. (Witness testifies:)

During the summer of 1913, I was employed at the power house of the Reclamation Service at the

head of the Main South Side Canal. This power house is so located that one side of the building fronts on the cut off wall of the dam at the head of the canal; it is on the down stream side between the river and the canal. I was at this power house about the 11th or 12th of July, 1913, when the defendants, Elias Marsters and E. F. Lakin, and other persons went to the dam. Mr. Marsters asked me to deliver the keys to him. I refused and asked to communicate with the Boise office of the Reclamation Service to determine what course I should pursue, and was informed by the party who answered me that I was to state that I had no authority to deliver the keys or to open or close the gates as demanded. Mr. Marsters and those assisting him then went out on the platform where the lift devices were located, took a pair of bolt cutters and cut the hasps of the locks and manipulated the gate to reduce the flow of water. They had a man stationed at the waste way some distance down the canal who came up and regulated the gate after that, for I don't know how long. I was on the day shift after these locks were cut for the remainder of the month of July, with the exception of days when I was possibly on leave. I believe these men continued to operate the gates during the remainder of July. There were two guards and they took up their quarters in the blacksmith shop belonging to the Reclamation Service. I noticed one of them had a pistol of some description on the day he left there. He was on the government property at the time I saw the pistol.

Here witness was handed a package containing seven small locks and stated that they were the locks that were cut by the defendant Marsters. These locks were offered and admitted in evidence as plaintiff's exhibit "A".

(Witness continues:)

These locks were cut out with a double lever bolt cutter by Mr. Marsters.

Cross Examination.

There were eight of these locks in use at one time on the headgate. I have only seven here and do not know where the other one is. These locks have been in a chest in the Reclamation Service power house. This chest has not been kept locked and anybody may have had access to it. The only thing which defendants did was to cut these locks, and to lower the gate admitting water into the Reclamation Service ditch, the effect being to decrease the amount of water going into the said ditch.

George Clyde Baldwin, being called and duly sworn as a witness on behalf of the plaintiff testified as follows:

Direct Examination. (Witness testifies.)

I am a hydraulic engineer in the water resources branch of the U. S. Geological Survey, detailed as district engineer in charge of the work of the branch in the district with headquarters at Boise, which covers the state of Idaho and portions of Oregon, Nevada and Wyoming. I was employed in this capacity during the summer of 1913. On the 11th of July, shortly before noon, I went to the diversion

dam in company with Colonel Marsters and others. I cannot say absolutely that I saw them break the locks, but I know they lowered the gates after they got up there. They were acting under the direction of Mr. Marsters, and I remember seeing Mr. Lakin and Mr. McConnell working at lowering the gates. I took measurements in the government canal to determine the extent to which the water was lowered. The first measurement I made was from 1:50 to 2:20 P. M., and it was still falling at that time and it showed a discharge of 142 second feet, under not specially favorable conditions for measuring. At any rate it showed less water than they wanted to have left in the canal so the gates were raised.

MR. DAVIS: May it please the Court, we object to this testimony, and ask that the testimony of the witness already given in answer to this last question be stricken out on the ground that damage cannot be predicated upon water which has not entered—upon the loss of water, rather, which has not entered the ditches of the plaintiff. The cases all hold that there is no right in the corpu of water flowing in the river, and that no damage can be predicated upon any water which may have been prevented from entering the diversion works of the plaintiff. If the court wishes authorities upon that proposition, I will be glad to cite them.

THE COURT: I hardly think I understand you. Do you mean to contend that if one has a water right and you close down his gates so that he can't use the water upon his land, he can't recover damages?

MR. DAVIS: He can't recover damages for the loss of so much water. He can recover damages for the loss to his crops, or any other incidental injury which may have occurred, but he can't recover damages for the loss of water per se.

THE COURT: But the only way you can get at the loss to the crop would be to show how much water you were deprived of the use of.

MR. DAVIS: In this case they ask for damages for the loss of so many acre feet of water, which is absolutely an incorrect theory, at so much per acre foot.

THE COURT: The objection is overruled.

MR. DAVIS: Note an exception.

(Witness continues:)

At the time I made my first measurement only 142 second feet of water were left in the canal. I did not make a measurement before it was turned out and do not know how much was in before. I have kept records of measurements of the amounts of water flowing in Boise river. We have several stations on the river. The nearest one to the diversion dam is what is known as the Highland Station, which is probably about a quarter of a mile above the Goose Neck bridge on the Arrow Rock railroad, and about two miles below the mouth of Moore's creek. I know of no canals diverting water from the river between the Highland gauging station and the diversion dam, nor of any tributaries of any consequence coming into the river between these points. I kept mea-

surements on the Boise River at that station during each day of that season. The amount of water flowing in Boise River at that station on the 11th day of July, 1913, was 2420 second feet.

Here witness was shown a VanDyke negative giving the record flow of the water in Boise river at the Highland Station for each day of the season of 1913. This was offered and admitted in evidence and marked plaintiff's Exhibit "B".

(Witness continues.)

I made a second measurement on July 11th after they had raised the gates to turn in more water. This was made from 5:35 P. M. to 6:40 P. M. and showed 238 second feet. I have a note here stating that the gates at the head were opened slightly during measurement, but head of water only began to reach the measuring station at the close of the measurement. It is my understanding that Mr. Marsters thought it best to turn in a little bit more and be on the safe side, as he expressed it, so that at the time we left the head of the canal there was more than 238 second feet running in the canal. I do not know how much more but I think the increase was not material.

Cross Examination. (Witness testifies.)

I made three actual current meter measurements during the month of July. On July 7th, July 12th and July 24th, and others in August and September of that year; but the local observer read the gauge at least once every day and possibly twice on some days. The meter measurements are used to define

a rating curve; they measure actual quantities of water whereas the gauge measurements only record the stage or elevation of the water. From this rating curve which is derived from the actual measurement, we are enabled to get a rating table giving discharge for any different stage of the stream so long as the relation between discharge and gauge height remains constant; and it is in that way that we measure the discharge for each day from the daily gauge height. July 11, 1913, is the only date on which I made measurements of the amount of waater running in the government canal. I did not visit the locality again after that date.

George H. Bliss, being called and duly sworn as a witness on behalf of plaintiff, testified as follows:
Direct Examination: (Witness testifies:)

I am an engineer in the employ of the United States Reclamation Service acting as project manager of the Boise project. I occupied this position during the summer of 1913, and was so employed on the 11th day of July, 1913. The Boise project consists of the Boise River Diversion Dam, and Deer Flat Reservoir, the distribution system is about 1047 miles of canals and ditches, of which forty miles are main canal, including nine miles of Indian Creek covering approximately 243,000 acres of land of which 160,000 acres are dry lands which are dependent entirely on government water. By dry lands, I mean those that were dry at the time the project was conceived. Some of these lands have been irrigated since and are dependent upon the government pro-

ject for their water supply. In 1913, there were being irrigated 58,265 acres exclusive of the old New York lands, and of these there were between 18,000 and 20,000 acres, making from 76,000 to 78,000 acres irrigated under the government canal system during that season. This project was constructed by the United States under the Reclamation Act. The headgates of the Diversion Dam are located in lot 9, Sec. 3, Township 2 North, Range 3 East, B. M.

Here witness was shown a map which he identified as one of the Boise Project showing the location of the Diversion Dam and headgates and lands irrigated under the project. This map was offered and admitted in evidence and marked plaintiff's Exhibit "C".

(Witness continues:)

Witness was then shown a certificate from Mr. Balderston, former register of the United States Land Office which certificate sets forth that Lot 9, Lot 6 of Sec. 3, Twp. 2 North, Range 3 East, are now and have been since November 17th, 1903, unentered public lands of the United States, withdrawn from all forms of entry under the first form of withdrawal authorized by the Act of Congress of June 17, 1902. This is the land on which the government dam and headquarters are located. This certificate was offered and admitted in evidence and marked plaintiff's Exhibit "D".

The witness was here shown and identified a copy of water license No. 430 from the State of Idaho to

the United States. This water license was offered and admitted in evidence and marked plaintiff's Exhibit "E".

(Witness continues:)

I had records kept under my supervision of the flow of water in the government main canal during the summer of 1913. The water running in the canal prior to the time the locks were cut by Mr. Marsters and gates lowered was used for irrigation and stock and domestic purposes for the lands under the canal system. These lands were originally arid, were entirely dependent upon this water to mature crops; they had no other source of supply. The 18,000 or 20,000 acres of New York lands got their water from the government system, but they had a right of their own; that right was carried for them in the government canal. The right of the New York canal under the Stewart decree was 219 second feet. On the morning of July 11th, there were 980.4 second feet of water flowing in the government canal. At 6:20 P. M., this amount had been lowered to 261.2 second feet, the difference amounting to 719.2 second feet. These measurements were made at the gauging station just below the Barber wasteway known as M. C. No. 2. This difference would amount to 1438.4 acre feet per day. The amount flowing in the canal on July 12th at 4 P. M. was 236 second feet; therefore an additional amount of 25.2 second feet was cut out on July 12th. This was the last day that we have a record that he actually lowered our gate. We have the flow of the canal on

every day from that date on through the rest of the season, and it varied more or less. Mr. Marsters was in charge of the government gates from July 11, 1913, to October 3, 1913. We have an official record of the flow of water in the government canal for the remainder of the period that Mr. Marsters was in charge, and I have here a tabulated statement from July 11th to July 25th. This statement is based upon a rating curve for the main canal similar to the rating curve which Mr. Baldwin has delivered for the Boise River and our ditch riders take the gauge heights once or twice a day so we have the discharge of the main canal every day throughout the season. During a part of this period, we carried in the government canal besides the government rights and the right of the New York Canal Company some rights that were transferred to the canal from the lower river. We had a contract at that time with the Riverside Irrigation District by virtue of which we could deliver water from the Deer Flat Reservoir to their system and transfer any rights to which they might be entitled in the Boise River to our diversion works. We also had a contract with the Pioneer Irrigation District similar to this contract by which we got a portion of their water and transferred it to the diversion works in exchange for water furnished them out of the Deer Flat Reservoir. The amount of transferred rights varied in accordance with the right that they were entitled to in the river. The Phyllis Canal right No. 90, was for 53.1

second feet and the right No. 117 was for 200 second feet making the total of 253.1 second feet and we took one-third of that minus twenty second feet or 64.4 second feet was what we obtained from the Phyllis right. The amount exchanged with the Pioneer District under their four rights numbered 91, 124, 130 and 133 under the Stewart decree amounting to 190 second feet. We obtained all of that right while it existed in the river. Whenever their right was cut we cut the amount that we took into our canal. The total amount of these exchange rights in the canal would be 254.4 second feet at the maximum and 145 second feet at the minimum. We have a tabulated statement of water flowing in the government canal from July 11th to July 25th. On July 25th, we had a rain on the Boise River which raised the river and our water was turned back in although our gates were still controled by Marsters. The amounts of water flowing in the canal from July 11th to July 25th were as follows:

July 12th-13th, 312 second feet; July 13th-14th, 344 second feet; July 14th-15th, 435 second feet; July 15th-16th, 464 second feet; 16th-17th, 478 second feet; 17th-18th, 487 second feet; 18th-19th, 436 second feet; 19th-20th, 347 second feet; 20th-21st, 303 second feet; 21st-22d, 305 second feet; 22d-23d, 303 second feet; 23d-24th, 327 second feet; 24th-25th, 575 second feet.

On the 11th-12th there was no transferred water in the ditch; on the 12th-13th, there was 30 second feet; on the 13th-14th, there was 104 second feet;

on the 14th-15th, there was 233 second feet; on the 15th-16th, there was 254 second feet. This same condition existed to the 18th. From the 18th, 25th, there was 145 second feet of transferred water in the main canal. At that time 214 second feet of the New York Canal Company's decreed right was being carried in the government canal.

MR. DAVIS: What do you mean by decreed right?

MR. STOUTEMEYER: The right as decreed by Judge Stewart. The right which the government contracted to carry for them as decreed by the court.

(Witness continues:)

One second foot flowing for twenty-four hours is equivalent to 1.98 acre feet, practically two acre feet; and if you multiply the amount as expressed in second feet by 1.98 that would give you the number of acre feet for each twenty-four hours.

I have been connected with the project as project manager since July 1, 1912. Prior to that time, I had been irrigation manager from January 16, 1909 to July 1, 1912 in charge of the distribution of water. In that capacity, I became familiar with the amounts of water required for the raising of agricultural crops on the lands being irrigated under that project. The amount of water required for that purpose on July 11, 1913, was 980.4 second feet, and this amount was used for irrigation on that date. On that date, the United States was receiving forty cents an acre foot for the water delivered to

the farmer. The effect of cutting off water from the government canal by the defendant Marsters was to decrease the government's receipts. These receipts were decreased \$387.20 a day. There were thirteen days before the rain, occurring between July 25th and August 10th, giving us the water which we required, therefore there were thirteen days on which our water was decreased by that amount from July 12th to July 25th. The receipts were not decreased from July 25th to August 10th, but they were thereafter for sixty-one days during which Mr. Marsters had control of our gates.

Q. Were they decreased during all of that time except this period which you refer to?

MR. DAVIS: We object to that as leading.

THE COURT: I don't think I quite understand the witness. How do you know that they were decreased thereafter?

A. Because we didn't have sufficient water to meet our needs, our demands, except during this period in which the rains occurred, which gave us plenty of water, which was between July 25th and August 10th. After August 10th the river dropped again, and we were short of water from that time on to October 3d, when Mr. Marsters released the gates.

THE COURT: Do you know how much water you would have had, had he not lowered the gates, rightfully have had?

A. I don't know as I know what you mean by rightfully.

THE COURT: What you would have been entitled to take from the river. I say, do you know, under the conditions—

A. I was answering Mr. Stoutemyer's question on the assumption that we were entitled to what he cut out.

THE COURT: During the entire season?

A. Well, of course, if we were only entitled to—on the—I don't—there was a temporary order of the court in the meantime.

MR. STOUTEMYER: We propose to show those orders and rights by another witness, showing the value of the water by this witness.

THE COURT: I am willing to have you take a sort of short cut in this, if it can be done without prejudice to the parties. Of course, this conclusion would be rather an extraordinary one without showing the facts. Perhaps you had better show these orders first, and then I will have some idea as to about what the hearing of the testimony will be, and you can recall this witness.

Here plaintiff offered in evidence, and the same was admitted a certified copy of the order of the District Court of the Seventh Judicial District of the State of Idaho in the case of Farmers' Co-operative District vs. Riverside Irrigation District made by Judge Bryan on July 18, 1913. This was marked Plaintiff's Exhibit "F".

MR. STOUTEMYER: We notice in that order (Plaintiff's Exhibit "F" just above referred to), the order was made to distribute to the parties .6 of

an inch per acre, or .6 of the Stewart decree, the decree formerly made in this case. We have here the decree referred to upon which that .6 is based, but it is quite lengthy, and if there is no objection to it, we would like instead of offering the whole decree to merely offer the amounts shown by that decree to have been decreed to the several parties.

THE COURT: You mean the amounts and dates of appropriation?

MR. STOUTEMYER: Yes.

MR. DAVIS: You offer that as evidence, do you?

MR. STOUTEMYER: Yes.

MR. STOUTEMYER: We will ask that this portion of what is known as the Stewart decree be marked as plaintiff's exhibit and introduced in evidence.

Whereupon said paper was marked as requested and admitted in evidence as plaintiff's Exhibit "G".
(Witness continues:)

There was no reduction in the expenses of the government for the distribution of water as the amount in the canal was reduced by defendants; we had a certain amount of water to deliver and we had to keep on our men to deliver it.

MR. STOUTEMYER: What effect upon the canal itself has the sudden reduction of the amount of water flowing in it, to the extent which occurred in this canal on the 11th or 12th of July?

MR. DAVIS: We object to that as being incompetent, irrevelant and immaterial and not within the issues of the pleading, which objection was by the

court sustained and plaintiff noted an exception.
(Witness continues)

All of the works then completed were affected by the action of the defendants; the main canal was affected because we could not get the flow of water through it, and our lateral system was affected for the same reason, and the Deer Flat Reservoir was affected, inasmuch as we had to take water from that reservoir at that time that we could use later. The power plant was also affected by the possession of the gates by the water master. There was water diverted through the main canal and wasted at the Barber waste-way that was of no use to us in our irrigation, that could have gone through the power plant and created more power, provided it was necessary to waste it at all. We have a waste-way in the main canal approximately a mile below the head gates and they regulated the canal at that point rather than at the headgates. If they had regulated it at the headgates, that water would have gone through the power plant. As they did regulate it, it went through the waste-way and the power plant did not get the use out of it. We develop power at the diversion dam, and the act of taking water through the main canal and wasting it out through the waste-way rather than through the power plant deprived us of that much power. This decreased the output of the power plant.

THE COURT: In other words, more water was taken in at the point of diversion than was permitted to go on down through the canal?

A. Yes.

THE COURT: Did you object to that?

A. It decreased our power that much.

THE COURT: I say, did you object to that?

A. At that time? Yes sir. We called his attention to it at that time.

THE COURT: Did you ask him to lower the gates at the head, at the intake?

A. No, we didn't do that.

THE COURT: That is the only way you could keep the water out of the canal, isn't it?

A. Yes, If he didn't feel disposed to let that water go down the canal, he could have lowered the headgates and sent it down the river.

(Witness continues:)

We had two ditch riders read simultaneously the gauges above and below the waste-way, and by means of our rating curve we arrived at the amount which was wasted through the waste-way by the defendants during the period they were in possession of the government canal and headgates. It varied on different days. I have it here in tabulated form; it shows the amount wasted at the Barber waste-way by days from August 11th to October 3d. It really carries beyond October 3d, it carries it to the 12th, but Mr. Marsters released the gates on October 3d.

This statement was offered and admitted in evidence and marked Plaintiff's Exhibit "H".

MR. STOUTEMYER: If you had continued to receive the amount of water which you were taking from the river at the time that the possession of the government headworks was taken out of your hands by the defendants could you have continued to sell it at the rate which you were receiving for it?

MR. DAVIS: We object to that as incompetent, irrevelant and immaterial, and presuming that the taking was lawful.

THE COURT: You mean sell it for irrigation purposes?

MR. STOUTEMYER: Yes.

THE COURT: The objection will be overruled. You may cross-examine.

MR. DAVIS: Note an exception.
(Witness continues:)

We have 1456 government water users renting water from us. They have no other source of supply. We were renting water at the time Mr. Marsters took possession of the gates. I have no doubt we could have continued to rent the water if we had been able to keep it.

Cross Examination: (Witness testifies:)

On July 11, 1913, 980.4 second feet of water were running in the government canal. This measurement was made just below the Barber wasteway, about a mile below the point of diversion. The locks that Mr. Marsters interfered with were at the point of diversion at the headgates. All our measurements in the main canal were taken at what we call gauge No. 2; that is a better station; the

stations up at the head of the canal we do not get good measurements on account of loss through the gates and one thing and another. Whenever I have spoken of water in the canal it was water passing this waste-way. We claim that the government had a right to all water in the river not taken by prior rights. I admit that there are prior filings on the river. On the 11th day of July, 1913, we had offered proof on 1647 second feet of water. This amount was not in the river available for us on July 11th; the amount available was 980.4 second feet. I do not remember just how we arrived at that, but we had been working in co-operation with the lower canals. I do not know just how we arrived at that particular amount. As I remember it, that was the amount that would give us water for our lands without any water whatever running into the Deer Flat Reservoir. We agreed to cut out, my recollection is, until there was no water being stored in the Deer Flat Reservoir. This was a kind of a tentative agreement. I talked it over with Mr. Stoutemyer, and I think I talked it over with other attorneys representing prior rights. In taking water from the river, we recognized priorities, but we did not recognize any amounts until the decree of the court. As project manager, my understanding was that the Stewart decree held us as to priorities but not as to amounts, that was my understanding. We did not determine the amounts which these priorities were entitled to though until we had an order of the court. We released everything from the canal system until

nothing was flowing into the Deer Flat Reservoir, and we kept the balance until Mr. Marsters interfered with the locks, or until there was some order of the court. On July 11th, we were actually delivering about 277 second feet to the New York Canal Company. We had a contract to deliver their water, and under that contract I think it has been ruled that up until the time there was some decree of the court we would deliver 277, and after there is a decree of the court we deliver 219; anyway, I know that part of the time we delivered 277 and part of the time 219. We wasn't carrying any water except for our own uses and the New York Canal. The transferred water to which I have referred was for our own purposes.

Q. How did you determine how much you were entitled to take for your own purposes under those transferred rights?

A. By agreement with the companies with which we had contracts. We had contracts with them, and I would call them up, and they would tell me how much I could take, and then I would talk with the Directors of their Districts, and possibly with the Water Commissioner, or his deputy, and I don't know just how it was arrived at, but it was under those contracts which we had with those companies.

Q. Now then, in view of all that, Mr. Bliss, I would like you to tell me just as simply as possible how you arrived at the amount of water which the United States was entitled to use on the 11th day of July, 1913.

A. We assumed that we was entitled to everything, without an order of the court, that is, up to a certain amount, that was agreed upon between these attorneys. I think they told me—in discussion with Mr. Stoutemyer—as to what we should keep and what we should let go.

(Witness continues:)

Mr. Stoutemyer told me to stop running water out of the river when there was no more running out of the Deer Flat Reservoir. We agreed to cut out everything in our canal until there was nothing flowing into the Deer Flat Reservoir, until we were not storing any more water, and when we reached that point we refused to cut out, and there was 980.4 left. We intended to continue taking that amount until the order of the court. We did not base this amount on anything. We just assumed there was no order of the court, that the Stewart decree stood as to priorities simply and did not carry any amount, and therefore until there was an order of the court, the Stewart decree was void as to amounts. 980.4 second feet delivered to the New York Canal Company what they required for their lands, and gave us what we required for our lands without any surplus running into the reservoir, that is, that was enough; when we had that we had what we required.

Q. In other words, you took what you required regardless of whether the prior appropriators had what they required or not?

A. We took this amount.

Q. And you say that is what you required?

A. That is what we required to properly irrigate our lands on the project, on the proposition that there was no order of the court then in effect.

Q. And until there was an order, you assumed you had a right to whatever you required for your lands?

A. Yes.

Q. But I thought you admitted that you recognized these prior rights, and I don't see how you recognized them and disregarded them at one and the same time.

A. I say we recognized them as to dates of priority; at least I have personally. As I understood the Stewart decree stood as to priorities, but not as to amounts. I have never recognized the Stewart decree as to amounts.

Q. Suppose, Mr. Bliss, that there were only 980.4 second feet in the river at that particular time, would you suppose you could take it all because you needed it all?

MR. STOUTEMYER: We object to that question because it is supposing facts that did not exist, and it is not material in this case.

THE COURT: You may answer.

A. I don't know what we would have done, of course, under that circumstance, but I was acting under the advice of my counsel in taking this amount of water.

(Witness continues:)

We did let a definite amount go down the river, but I do not know just how we arrived at that amount. We rather assumed that when the temporary order of the court would be given that it would be about what it was when it was finally given on July 18th, that is .6 of the Stewart decree, and we planned on letting that amount go down the river, taking into consideration the return flow. That is about the basis on which we worked. But even before this temporary order of the court was entered, those people having prior rights had, I think, a right to water before us. As I say, I recognized their priorities, I do not recognize any particular amount thereof. In turning out water for the New York Canal people, I think there has been a question for some time as to just what they were entitled to. We assume that they were entitled to what they were given in the Stewart decree. This was 219 second feet. We did not assume that all other people who had awards in the Stewart decree were entitled also to the amounts fixed in the Stewart decree equally with the New York people. We have a five years contract to transfer water with the Riverside Irrigation District. With reference to the amount of water we used under their right on July 11th, I think Mr. Lakin, deputy water master, arrived at that amount. I do not remember just how it was, but it was some of their rights under the Stewart decree. We also have a contract with the Pioneer Irrigation District to turn water out of the Deer Flat Reservoir and take a like amount out of the Boise River.

Q. And on the 14th and 15th day of July, 1913, you claimed 43 second feet from the Phyllis canal, did you?

A. Yes sir.

Q. And did you turn a like amount out of the Phyllis canal from the Deer Flat reservoir?

A. My recollection is that we did, yes sir.

Q. On what basis did you turn that out?

A. It was based on the same basis that we were entitled to a third of the water that they had been decreed under the Stewart decree, minus 20 second feet.

Q. Then you recognize the Stewart decree insofar as the Riverside Irrigation District was concerned, and the Pioneer Irrigation District?

A. We worked with the deputy watermaster, is my recollection, and he told us what we were entitled to.

Q. Then you recognize an inch to the acre so far as those two companies are concerned?

A. I don't know about an inch to the acre. I don't know what they were decreed under the Stewart decree.

Q. Then you recognized the Stewart decree as to the amount of water so far as those districts were concerned?

A. That is the amount we had in that canal.

Q. And that is what you took out from the Boise River?

A. Yes sir.

(Witness continues:)

In determining the loss to the United States that has been estimated at \$387.20, we found that Mr. Marsters, between July 11th at four P. M. and July 12th, cut out 1,488.8 second feet of water, and we found that we can deliver to the ground about 65 per cent of the water we take in the canal, so we take 65 per cent of 1,488.8 as the amount of water that could be delivered to the ground, and then multiply that by 40 cents an acre foot. That gives \$387.20, the amount of that water per day that he cut out. There were thirteen days between July 12th and 25th, and we took thirteen times \$387.20. This calculation is based upon the assumption that we were entitled to take out for each of those thirteen days the 980.4 second feet that we were taking out on July 11th. The river was falling more or less rapidly about that period and I don't know just what we were entitled to take until July 18th. On July 18th a temporary order of the court went into effect fixing the duty of water for prior rights at .6 of the Stewart decree. The amounts decreed to the rights prior to ours was about 2755 second feet, and on the 11th of July the natural flow in the Boise River was 2420 second feet. Without taking into consideration the return flow at points on the river below our diversion dam, the prior rights amounted on July 11th to 300 feet more than there was in the river. The return flow is in the river available for use the same as the natural flow, and so the total flow, I think would be there to distribute. On July 18th when the order of the court fixing

the duty of water for the remainder of the season went into effect there was approximately 1710 second feet of water in the Boise River above our diversion dam. This order fixed their rights prior to ours at some 1619 second feet.

Q. If there was 1710 feet in the river on July 18th, when this order went into effect, and prior rights were entitled to 1619 feet, then upon that basis you certainly were not entitled to 980.4 second feet, were you?

A. Not on that basis.

Q. What right have you to say you were damaged in the sum of \$387.20, or any other amount, unless you also state the basis on which you make that calculation?

A. I have made my calculation on three bases; one is, that Mr. Marsters didn't have any right at any time on government property, and another was that up to the time, he didn't have any right up to the time of the temporary order or decree, but would have a right after July 18th.

Q. But in making this calculation isn't it true that you assumed throughout that you were entitled to have the amount of water you were taking on July 11th?

A. That is on the assumption that he hadn't any right to take it out at all at any time.

Q. But you are trying to establish your right here; you are asking for damages. We are not defending. We are trying to make you prove your

right. We are trying to find the basis on which you assert a right.

A. I have told you the basis.

Q. . You have told me?

A. Yes.

(Witness continues:)

Up to the capacity of the power plant all the water going down the river goes through the mill; anything over that goes over the dam. Mr. Marsters shut off 719.2 second feet from going into our canal and I presume a portion of that went through the power wheel. The average number of second feet that wasted back into the river below was I think about forty, and the action of Mr. Marsters undoubtedly increased the amount of water that went through the power plant and increased the power for the time being.

Re-direct Examination: (Witness testifies:)

Under this temporary order of the court which was made on the 18th of July, the amount of water to which the New York Canal Company was entitled was .6 of 219 or 131 second feet approximately. There was transferred or exchanged water in the canal between July 12th and July 18th. The amount of exchange water recognized and turned into the canal was determined by Mr. Lakin, acting under Mr. Marsters. We had no control of it. The 1619 second feet which was .6 of the amount of the Stewart decree included the decreed right of the New York Canal Company which was carried in the gov-

ernment ditch, and the amount to be turned below the government ditch would be less than 1619 because the New York right was taken out in the government ditch. Besides the normal flow of the Boise River as measured at Highland Station, there are a number of natural creeks—Indian Creek and Mason Creek and Wilson Creek and Middleton Slough and a number of sloughs coming into the river below the diversion dam bringing in a considerable amount of water. A large part of this comes into the river at points which make it available for supplying prior rights. There was no material difference in the amount of water required for irrigation between July 9th and July 18th of that year.

Re-cross Examination: (Witness testifies:)

It does not necessarily follow that because a duty of .6 of an inch late in the season is fixed as sufficient that prior to that time this would be the proper duty of water.

Vernon H. Tregaskis being called and duly sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination: (Witness testifies:)

I went to work for Mr. Marsters either the afternoon of July 11th or the afternoon of July 12th, 1913, and I continued in his employ for twelve days, I believe it was. I was employed as a guard at the diversion dam for the headgates; I was part of the time at the waste-gates and part of the time at the headgates.

I was acting indirectly through Mr. Marsters. He had a man there by the name of Ed somebody that acted as a kind of foreman over us while we was there—that is, he attended to the regulating of the water. I got orders mostly from Mr. Marsters, and was employed to watch the headgate and to keep anybody from molesting headgates, raising or lowering them, except by the orders of Mr. Marsters. The original change in the gates had been made before I went up there. We stayed principally in the blacksmith's shop at the edge of the dam, and I slept a number of nights down below the waste-gates where the weir is. We used the government blacksmith shop for cooking purposes, and we utilized the forge in lieu of a stove. There was a tool shed at one end of the shop, and if the weather was bad we slept in that; otherwise we took turn about sleeping. There was a bench outside the blacksmith shop that we slept on. I carried arms when I went to work there.

Defendants admit that they took possession of locks and cut the locks which were there, and controlled and operated the gates and controlled the water until some time in October.

Harold Conklin, being called and duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination: (Witness testifies:)

I am a civil engineer employed with the Reclamation Service, and in the summer of 1911 I was at the Boise office. I am familiar with what is known as the government power plant located at the diversion

dam on the Boise project. I can determine the amount of power that can be created at that plant by a given volume of water going through it. The maximum capacity of the plant is 2,000 kilowatts. 1260 second feet of water are required to develop the maximum capacity of the plant.

Here witness identified a certain paper which purported to show the loss of power caused by interference with the regular flow of the Boise River in August, September and October, 1913. This paper was offered and admitted in evidence and marked Plaintiff's Exhibit "I."

(Witness continues:)

If Exhibit "H" is a correct statement of the water which was wasted through the waste-way of the government canal under the charge of defendants, then if this additional water had been allowed to flow down the river instead of being taken into the canal and carried around the power plant, there would have been 20,160 kilowatt hours of additional power developed. In September, there would have been 15,888 additional, and in October 984. I have in my possession a copy of the contract between the United States and the Idaho Oregon Company for the sale of power, and under the rates agreed upon in that contract, the additional power which may have been developed could have been sold for the sum of \$259.22.

Cross Examination: (Witness testifies:)

The first date that this calculation I have made begins on is the 11th of August; that is the date on

which I understood the headgates were first regulated by the water master. On that date 966 second feet passed the government canal and went on down the river. 991 second feet would have gone through if there had been no water wasting through the waste gates. My estimate of the power developed on that day and the power which was lost is based upon the difference between those two amounts. The loss on that day was 33 kilowatts. I made a similar calculation for the next day. I believe the Idaho Oregon Company was under no obligation to take this power under its contract.

Here plaintiff offered in evidence Exhibit "J," a copy of the contract with the Idaho Oregon Company above referred to.

(Witness continues:)

I was not in charge of the power plant during 1913. My duties had nothing to do with this power plant. The only thing I did was to make an expert calculation of what might have happened supposing these other tables that were offered in evidence are correct.

Austin D. Price, being called and duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination: (Witness testifies:)

I am an engineer in the employ of the Reclamation Service in charge of the work of the hydrographic branch of the project, measuring the flow of water in the various canals and also in the Boise

River. I have been engaged as engineer in the measuring of water for a little over five years. In the summer of 1913, I was working for the Reclamation Service in Boise in charge of measurements on the government main canal at the power plant; I also measured the Boise River at the various stations. I made measurements at the station at Highland on the Boise River and measurements on the main canal both above and below the wasteway. I made these measurements during the season of 1913 after July 11th. I did not make any measurements showing the amount of water flowing through the government power plant at the government diversion dam, simply the river and main canal. The amount of water flowing through the power plant was determined by measuring the river at Highland and measuring the canal and determining, of course, whether or not there was any water being wasted over the spillway at the power plant. With no water over the spillway, the difference between the amount in the river above the dam and the amount in the canal would give the amount going through the power plant. I made all the measurements shown in Plaintiff's Exhibit "H" of water being wasted out of the wasteway on the main canal.

Cross Examinations (Witness testifies:)

The Highland station is about seven or eight miles—possibly six or seven—above the diversion dam. When I measured the water running in the government canal, I made measurements both above and below the Barber waste-way; about 300 feet below and

about half a mile above. We have regular measuring stations at those points. The measuring station about half a mile above the waste-way is designated as M. C. 1, and, of course, if there was no water wasting out of the Barber waste-way 1 would give the discharge. When water was wasting out of this waste-way M. C. 2 will give the correct discharge the canal is carrying, and No. 2 is used merely sometimes for what the canal is carrying below the waste-way. In 1913 No. 2 was used for determining the capacity the canal was carrying for delivery to the lands. I had nothing to do with controlling the amount of water going into the canal. I simply measured it. I happened to make the measurements of the water wasting from the main canal in 1913 because that is my regular work measuring M. C. 1 and M. C. 2, and the difference between these two measurements gives you the amount of water going out of the waste-way. The amount wasting out varied from about 21 acre feet to 160 acre feet per day. I only saw Mr. Marsters or the men under him raise or lower the gates once and that was on the 12th of July. The figures prepared by me were used for the purpose of computing the power development and the loss of power by reason of the water which did not pass through the turbines. Every time I had occasion to visit the power plant, there was no water going over the crest of the dam. It was all going through the turbines. The tables show the last date on which this loss occurred as October 12th. It has been testified that Mr. Marsters and his men relin-

quished control over the canal on October 3rd. I know nothing about the loss which occurred between October 3rd and October 12th; I simply prepared my table covering my year's work and they used whatever part of it they saw fit. I had nothing to do with the application of the table I prepared at all.

C. C. Bennett, being called and duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination: (Witness testifies:)

I have been working for the Reclamation Service for about three years and was employed as a watchman on the New York Canal in 1913, that is the same canal referred to as the government main canal. While so employed I saw the men under Marsters operate the waste-gates on the main canal wasting through the Barber pond. I saw this most every day. Some days they would not operate them, but most generally every day. They put locks on the gates after they would run them up or down. I took readings on the gauge below the waste-way three times a day—once in the morning, once in the afternoon and once in the evening. I turned these in to Mr. Healey on a report card which came to the Boise office.

Guy Healey, being called and duly sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination: (Witness testifies:)

During 1913 I was employed by the United States Reclamation Service as ditch rider on the New York

canal. While so employed I saw Mr. Marsters or the men under him regulate gates; it was just a case of running them either up or down, and they put locks on the gates. I took readings for the purpose of determining the amount of water running out of the waste-way. I took such readings generally twice a day, both above and below the waste-way. The reports of these readings were sent to George H. Bliss, reclamation manager.

Cross Examination: (Witness testifies:)

I took the readings below the waste-way twice a day and once a day above. There might have been a few times that I failed on the upper reading M. C. 1, but I think most of the time, every day. The most of the times that I saw the representatives of Mr. Marsters regulating the gates was somewhere in the neighborhood of the 12th or 15th up until some time in August, or perhaps the latter part of August.

A. V. Tallman, being called and duly sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination: (Witness testifies:)

I am a civil engineer, specialized in water troubles. I have specialized in the measurement of water since the spring of 1910. This year, beginning the first of April, I have had charge of the Boise River as a special deputy from the State Engineer's office. In this capacity I have made an investigation of the amount of return flow coming into Boise River below the government diversion dam. Last year, on the 9th of July, we made complete seepage measurements, or

complete measurements on all the canals on the Boise River, and also measured all tributaries to the Boise River coming in below the government dam to determine what was tributary gain, and what was seepage gain, and on that date we found, if I remember right, 827 second feet of return flow that could be distributed over again.

Q. What effect did that have upon the amount of water which it was necessary to turn down below the government diversion dam to supply the rights decreed under the temporary order of the court?

A. Last season—

MR. DAVIS: We object to that, if your Honor please, on the ground that it is incompetent.

THE COURT: Unless you promise to show that conditions were the same the previous season as they were last season, of course this testimony would be wholly incompetent.

MR. STOUTEMYER: I think we can show that they were approximately the same.

THE COURT: Very well. On that promise the objection will be overruled.

(Witness continues:)

It made it possible to reduce the supply necessary to let down the river; by watching the lower end of the river and utilizing all this return flow along the latter part of June, I was able to dry the river up a mile below Star, the Canyon County Canal, and I maintained that point as being the end of the river practically the rest of the season, and there was suf-

ficient water below there to take care of all the lower rights, and that made it possible to maintain water, the old New York stock right, which is supposed to be a rather poor right on the river, made it possible to keep water on that right up until I think it was the 30th or 31st of July. Last year was a rather unusual low water year. On an average, for July, of a .6 basis, it would take between 900 and 1000 second feet to supply .6 of the Stewart decree to the rights. Figuring on the basis that my average return flow for the month of July would be 600 second feet, last year in July the return flow decreased as the season advanced, due to the fact that the canals were taking in less water all the time, the river supply was decreasing all the time, and that materially affects the return flow. This would average 600 feet in July. I have been keeping measurements on the canals in the Boise valley; my water masters have read the gauge every day, and I have a system of co-operation through which I exchange these gauge readings with Mr. Stewart of the Reclamation Service, and he has two men measuring these canals. I have been mixed up with these canals so long that I know just about when they get to the limit. I know pretty closely the amount of water they take when they are taking all they want.

The latter part of August (1914), about the 15th of August, the water reached the lowest stage in the Boise River, about 700 second feet at Highland, and it held constant through the month, and the latter part we found the return flow was down to about 425

feet. We made a couple of measurements early in the month of August, and I think the return flow was between 500 and 600 feet, and I should judge the average for August is about 500 second feet of return flow. At this time of the year, there are no tributaries. The return flow for September (1914) averaged about 425 feet the first fifteen days, and I think it was on the 17th of September that we got a rather heavy rain that upset everything that we had outlined from that time on. I called my water masters off at that time. I could not say how the season of 1914 and the season of 1913 compared as to climatic conditions. I couldn't testify to any difference in the rainfall or other conditions.

Cross Examination: (Witness testifies:)

These measurements that I spoke of were made during the season of 1914 only. There is considerable variation in the water in different streams in different years. In order to get any figure which could be taken as an average for a year for any given time, you would have to take measurements over a series of years and then the average might play you a trick. It would all depend upon the comparison between the seasonable demands, seasonal conditions whether the statements with reference to 1914 may have been very far from accurate with reference to 1913. Our conditions at the present time are far from what they have ever been. Different from any year I have heard of or any records I can find. About the first of May this year, the Boise River was lower than it was on the first of July last year. The fact

that the Arrowrock Dam has been constructed to a point where it will hold water, and that water is being stored there, has now and for this season generally something to do with the amount coming down.

Re-direct Examination: (Witness testifies:)

Under the present conditions in regard to the demand of the ditches below the government diversion dam, in my estimation the present demand is unusually large. I have never known them to require a larger amount than they are taking now. The maximum in all the time I have been on the river is about 1800 second feet. With reference to the return flow, these drains that have been constructed around Caldwell are developing a good deal of it, and Indian Creek, and pick up waste water from the Ridenbaugh canal. These drains were constructed in the last two or three years. I could not say whether any of them were in existence in 1913. All of these sloughs carried a good deal of water. The Middleton slough at Middleton picks up water from those three Middleton canals, and Ten Mile and Five Mile Creeks all pick up seepage water. What I classify as waste water is water that is wasted by each farmer tributary to these sloughs, and there is always a certain percentage of waste water from each farm, and that gradually accumulates until it develops a considerable stream, and there is always some seepage water right around that country around Caldwell. The return flow that can be measured comes from Indian Creek, Mason Creek, Mason Drain, Caldwell Drain, Ten Mile Creek and Middleton Mill Slough, and there is

the Boise sewer, and there are several little wastes—there is the Phyllis waste, the Thomas slough—there are a number like that that we kept track of all the time. I have to determine just what they are carrying every day so that I will know how to handle my water. Last year we measured the Boise sewer, and at different times it was carrying as high as 22 second feet of water where it runs into the river.

Re-cross Examination: (Witness testifies:)

I am acquainted with the canal owned by the Farmers' Co-operative Company. Its capacity is about 250 second feet. They were diverting yesterday a little over 100 second feet. Today they are diverting 160 second feet. I am acquainted with the canal owned by the Middleton Mill District. They were diverting yesterday 80 some second feet. They are carrying today about 100—they are carrying very close to 115 second feet. The Farmers' Co-operative Canal is carrying today about 160. The capacity of the Riverside Irrigation District Canal is about 220 or 225 feet. They were short yesterday. I didn't get that report. I know the canal known as the Sidenburg Canal. I have not got my rating curve with me, or I could tell you correctly its capacity. They are diverting their canal full today. The Sebris Canal people were demanding more water yesterday. I suppose they could carry it if I could turn it down to them. The difference between what the Sebris Canal was carrying yesterday and its capacity is 90 second feet. The capacity of the Farmers Co-operative Canal is 250 second feet, and they are carrying

today 160 second feet. They are carrying one five on their gauge, which gives them exactly 202 second feet, is what the Sebris canal is carrying today. I wish to correct that statement; I got mixed up a little bit.

George H. Bliss, being recalled as a witness for further cross-examination, testified as follows:

Cross-examination: (Witness testifies:)

Before Mr. Marsters went up there and took water, he asked me to cut out 400 second feet. I declined to do that. I do not remember a conversation with Mr. Marsters in regard to the waste-gates in which I asked him to regulate the flow of water at the point of diversion rather than at the waste-gate. I remember that I called Mr. Marsters' attention to the fact that he was wasting water at the waste-gate. I don't remember what he told me in reference to that. I don't remember a conversation in which he told me one of the headgates did not close and that he couldn't stop the water off at the waste-gates, that he would regulate it at the point of diversion if I would fix this waste-gate so that it could be closed. I do not remember. I had some conversation about the water wasting there, but I don't recall his telling me he would regulate it. I remember that one of the gates leaked some water. This could have been regulated at the headgate and water enough turned off to offset the leakage. He could have controlled it at the headgate just as rapidly as he could at the waste-gate by raising the headgate more to overcome the amount that leaked under the waste-gate. Defend-

ants regulated the water by lowering and raising the waste-gates instead of by lowering and raising the headgates.

O. G. F. Markhus, being called and duly sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination: (Witness testifies:)

I am receiver of the Idaho Railway, Light & Power Company. In the summer of 1913, I was general manager of the Idaho Oregon Light & Power Company and of the Idaho Railway, Light & Power Company; at the time this company was buying power from the United States. This power was generated at the diversion dam plant. It was tied into our system at our Barber power plant and was so adjusted that the surplus power from that plant would turn automatically into our system. We are paying for that power at the rate named in the contract between our company and the United States, and we were taking all the power that we could get from the United States at that time. We would have taken more power from the United States if we could have received it. I could not give you the exact amount we would have taken. It would be a considerable amount for the reason that the Idaho Oregon Company was buying first from its parent company, the Idaho Railway, Light & Power Company, owned by the same people; second, from the United States from the diversion dam, with whom we had a contract, and any surplus needed from the old Beaver River Company. We would have taken 984 kilowatt hours in addition to what was available covering the whole period, if

we could have received it. Our company would have taken the additional power which would have been available from the government plant, if there had been an additional amount of water flowing through the power plant of not to exceed 37 second feet.

Cross Examination:

Witness was shown and identified a copy of the contract entered into between his company and the United States Reclamation Service.

(Witness testifies:)

Under this contract, the government has a right to use all of the power that it develops. We had no vested right in any power there at any time. It all depends on whether or not there is any surplus after they have used all they want for other purposes. We felt that a consideration of the rate was that we take all the surplus that the government had as surplus above their own needs, and that we were under obligations to take that surplus, and that is the reason why the government surplus came in second after the Idaho Railway, Light & Power Company surplus as referring to the needs of the Idaho Oregon Company and the additional power required above those two sources would then be taken from the old Beaver River Company. The rate from the United States is lower than the Beaver River Company, and it would be to our advantage to take it from the government first.

Edwin Healey, being called and duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination: (Witness testifies:)

I am water master for the Reclamation Service, and was so employed in the summer of 1913 on the main canal, the upper section. I observed the waste-gates which empty into the Barber pond prior to the time that Mr. Marsters and his assistants took possession of the canal heading. Those gates were tight and in good condition prior to the time that Mr. Marsters and his men began operating them. I do not believe they were injured much at that time. They seemed to have leaked more after Mr. Evans up there was operating them. Evans was one of Marsters' men. They seemed to leak more after he operated them. The cause, I suppose, was not letting them down properly. They were very heavy gates, and should be handled very carefully. They are made out of concrete partly, and it is necessary to operate them very carefully to avoid springing them. It was not necessary to regulate those gates at all to regulate the flow of the main government canal. I do not regulate the canal that way.

Guy Healey, a witness heretofore sworn on behalf of plaintiff, was recalled for further examination and testified as follows:

Direct Examination: (Witness testifies:)

I observed the waste-gates on the government main canal where they empty into the Barber pond, a short distance below the government headgates, prior to the time that Mr. Marsters and his assistants took possession of them and began regulating them. It was my duty to make observations of such things

each day, and in fact I went past the waste-gates twice a day. The gates were tight and in good condition prior to the time that Marsters and his assistants took charge of them. It was not necessary in regulating the main canal to operate those gates. I did not regulate the canal in that way when I was in charge of it.

Cross Examination: (Witness testifies:)

I was in the court room yesterday and heard Mr. Bliss state that one of these gates was out of order and leaked. The gates, I believe, there is one gate that is subject to leaking a slight bit.

Q. And that was leaking before Mr. Marsters took control, was it?

A. I believe not.

Q. When did it start to leak?

A. After the gates had been operated.

Q. Were you up there the day that Mr. Marsters first took control of this diversion of the water there?

A. I was.

Q. Didn't you notice on that day that it was impossible to stop all the waste that was running through that one gate?

A. Yes, to stop all of it, yes sir.

Q. Then, some did run through there at that time?

A. Very, very little.

Q. Then that didn't start after Marsters came there?

A. It did.

Q. I thought you just said it was running there at the time and they were unable to stop it.

A. Very slightly.

Q. But there was some running through there, was there not?

A. A slight bit, yes sir.

MR. DAVIS: That is all.

Re-direct Examination: By

MR. STOUTEMYER:

Q. Was there any material amount running through there?

A. No sir.

Q. Merely a little seepage?

A. A slight bit, yes sir.

Q. More or less than a second foot?

A. I presume there was that much, possibly a little more.

Q. Is it your judgment that it was about a second foot, or a little more?

A. I presume there was a little more than that.

Q. What amount would you say?

A. I would say in the neighborhood probably of from one to three second feet, somewhere around there.

MR. STOUTEMYER: That is all.

Re-cross Examination: By

MR. DAVIS:

Q. Three second feet of water is some stream, isn't it, Mr. Healey?

A. Yes, it is some little water.

MR. DAVIS: That is all.

W. G. Stewart, being called and duly sworn as a witness on behalf of plaintiff, testifies as follows:

Direct Examination: (Witness testifies:)

I am assistant engineer in the Reclamation Service. I have been investigating the duty of water, hydrographic work, and the duty of water on the Boise project. I have been so engaged since March, 1909. I have made measurements and investigations to determine the amount of water diverted by the various canals on the Boise River and the amount of return flow in the Boise River. I have made measurements and determinations as to the return flow from seepage and return flow from tributary gains. I have here a chart of Boise River. It is diagrammatical. It is approximately correct as to the distance for the diversions, but not accurately. It gives the average of the diversions and tributary flow for a period of thirty-four days from August 8th to September 10, 1914, but in a diagrammatic form which was to give an idea of the whole situation of the Boise River from the diversion dam to Notus, a point about eight miles below Caldwell. This is correct as to the relative location of the various canals diverting water and the various streams contributing return flow.

This diagram was received and offered in evidence and marked Plaintiff's Exhibit "K."

MR. DAVIS: We object to the admission of this in evidence, since, as stated by the witness, it was pre-

pared in the latter part of 1914, and therefore can throw no possible light upon conditions existing in the summer of 1913.

MR. STOUTEMYER: It is offered with the understanding that it is offered for the purpose of showing the locations of these tributaries and of the canals, relative locations, and also for the purpose of showing that the conditions were similar in 1913 to what they were in 1914.

MR. DAVIS: I object to it on the further ground, because the witness himself has admitted that it is not accurate as to locations, but only approximate and as to quantities flowing we renew our objection.

MR. STOUTEMYER: It shows accurately the relative locations as to what canals can be supplied from the portion.

MR. DAVIS: And as to the amounts flowing, we object to that on the ground that it affords no basis for any judgment as to what the condition was in 1913.

THE COURT: Sustained as to the latter purpose. Overruled as to the former.

(Witness continues:)

I made measurements and investigation on the flow of water in the Boise River in the years 1913 and 1914. The flow in 1913 was considerably more than in 1914 for the months of May, June, July and August. In 1913, in May, the average discharge of Boise River was 9250 second feet. This was at Highland. In 1914 it was 8930. In June, 1913, it was

6890. In 1914 it was 5130. In July, 1913, it was 2560. In 1914 it was 2000. In August it was 1340, in 1913, and in 1914 it was 947. The additional flow in 1913 over 1914 had a tendency to increase the return flow because it gives the canals a greater use of water during the irrigation season, and whenever you increase the quantity of water delivered to the canals, you invariably increase the return flow of Boise River on account of the increase in tributary flow. Usually the largest tributary coming into the Boise River below the government diversion dam is Indian Creek. This creek has the largest flow in July. I kept measurements on the amount of water flowing in that tributary in the year 1913, and also in the year 1914. In 1913, in the month of July it had the largest flow in Indian Creek. I have prepared or made measurements and kept records showing the relations between the amount of return flow and the amount of water being diverted by the canals. This is in hydrographic form so as to show in a diagram the relation of the flow of Boise River, the tributary water, the seepage water, and the deliveries to the canals, put in hydrograph by days. This was 1914, from July 9th to September 16, 1914. The lower line represents the discharge of Boise River for 1914. The second line is the added amount which comes in from tributary flow. The line above that shows the seepage, and the line above that the water that is delivered to canals, so that the intermediate spaces will indicate the amounts of water in each case. We make

measurements of Boise River, and we keep a continuous record of Boise River from day to day, and we have a continuous record of the discharge of the canals, all of the canals, that is the canals that take water out of the river from day to day. We have a continuous record from day to day of all the tributaries along the Boise River from Highland clear down to Parma. We have done more or less of that work for four or five years. I have measurements and investigations for determining the relations from day to day between the amounts being diverted and the amounts coming in as return flow. On previous years, on a number of different days, we have made single measurements the whole length of the river, taken the measurement at Highland, and then have gone and made a measurement of all the canals and tributaries along the river, and summed them up, just as I told you, for the particular day, and in that way we found out the relation between the tributary and seepage flow as compared with the flow of the river. Last season we undertook to carry on day by day, so as to show for the entire low water period that tributary and seepage flow was most essential to the irrigation needs of the valley. We wanted to know what that relation was, the relation to the flow of the Boise River, and how it acted in relation to irrigation, and kept that up for the whole season day by day, and put men on for that special purpose, to investigate that, kept that up continuously, and I have that plotted in a diagram which is the one that Mr. Stoutemyer refers to, and that diagram shows

that whenever the river increased the canals took that discharge into their heads, it was used—it was in the low water period, and whenever they took that in there was an increase in the return flow in the next two or three days. It didn't come the same day, but it would follow. We get an increase at Highland and the increase will come a day or two later, and the increase return flow will come maybe two days later than that, so there is a continuous lag on that wave that comes down the river, and that is shown in this hydrograph very distinctly.

In 1913 we didn't make very close investigation along the river. Our principal investigation in that connection was mostly on the project. We did keep a record of Indian Creek, but nothing extensive. In 1911 and 1912, we had quite complete records, but it so happened that in 1913 we haven't complete records. In 1912, we have records that indicate the same thing that we have here. We had continuous records in 1912 on a number of important tributaries, and the tributary flow is practically the same in 1912 that it was in 1914. The flow of the river was, I think, a little bigger in 1914 than in 1912. It was higher in 1913 the early part of the season. I think it was higher in 1912 than in 1913 during the irrigation season. I think it was. During the period in consideration, July and August in 1912, the water was considerably higher than in either 1913 or 1914. I have not the return flow complete for 1913; the return flow was approximately the same so far as we have it, on the important tribu-

taries, like Indian Creek and Middleton Mill slough, and Ballentyne and those creeks. That return flow is very constant so far as we have been able to observe. It was more in July, 1913, than it was in 1914. I attribute that to the fact that the river had more water and they used more; that is, it was available to them at that part of the year.

THE COURT: How do you account for the fact that in 1912 you had more water than in either year? You said the return flow was about the same.

A. When I say about the same, it may have been a little more, but as near as we can get at it it was approximately—

THE COURT: It may have been a little less?

A. Yes—Well, in 1912, it might have been a little less; yes, though they had more water. That return flow is very nearly—

THE COURT: You may put this in afterwards, Mr. Stoutemyer, but I shall consider it of practically no value unless it is accompanied with that of other years. I will say very frankly to you that I haven't very much patience with inferences drawn from single experiments. They are just as apt to be misleading as not.

MR. STOUTEMYER: This diagram is offered as plaintiff's exhibit "L."

Said diagram was thereupon marked Plaintiff's Exhibit "L."

MR. DAVIS: We renew our objection pro forma.

THE COURT: Overruled.

MR. DAVIS: Note an exception.

(Witness continues:)

We had records of Indian Creek, Middleton Mill slough, Ballentyne and Boise Valley No. 2 waste-ways for 1911 and 1912. These measurements were practically the same as similar measurements during July and August, 1914. The return flow was practically the same so far as it was measured. In 1911 and 1912, I made a very extensive series of experiments as to the duty of water and the amounts of water being diverted by the various canals of the Boise River. This is the fifth season that I have been making experiments as to the duty of water. On the duty of water at the headgates, we covered about a little over 130,000 acres, experiments on the duty of water at the headgates in the Boise Valley. And on the duty of water at the farm in the valley itself I carried on one series of about 130 acres, and on the Boise project we had a number of experiments covering probably 200 acres. This measurement includes approximately eighty-five per cent of all the lands watered by the old rights in the Boise valley.

Q. Is there any material difference in the amount of water required for irrigation between July 11th and July 18th?

A. No sir.

Q. What amount of water—

MR. DAVIS: We desire to enter an objection at this point to this line of examination for the reason that if this suit has for its purpose the fixing of the duty of water as against the older appropriators on

this stream, the proceedings are defective, in that those appropriators have not been made parties defendant, and are not in court, in order to defend their rights.

THE COURT: Overruled.

MR. DAVIS: An exception.

(Witness continues:)

In order to supply all the old canals below the government diversion dam with .6 of the Stewart decree requires between 900 and 1000 second feet, approximately 950 second feet. It would vary slightly from day to day. In 1914, the average return flow from July 9th to July 31st, from the diversion dam to Notus, was 465 second feet. From Notus to Parma, it was 86 second feet, making 551 as the average return flow obtained for July. With reference to the difference between the duty of water in the season of 1912 and 1913, I didn't keep any careful record of the weather. The irrigation needs were practically the same. I didn't keep any careful record. On or about the time that the water master broke the locks on the government gates I made measurements of the canals on the Boise River. I made these on July 11, 1913. This was prior to the time that it was affected by the water turned out of the government canal. I found the Boise Canal diverting 41.83 second feet. This is more than the Stewart decree, which was 38.1 second feet. The Farmers Union Canal was diverting 187.5 second feet. The Stewart decree in that case is 164.58 second feet. The Middleton Mill ditch was diverting 73.79 second feet. The Stewart decree

was 64.9 second feet. The Phyllis Canal was diverting 322 second feet. The Stewart decree is 309.44 second feet. The Pioneer ditch was diverting 29.96 second feet. The Stewart decree is 25.72 second feet. These measurements were started early in the morning and completed in the afternoon. These measurements were all taken before the river was affected by the cut at the diversion dam.

Cross Examination: (Witness testifies:)

Mr. Bliss, the project manager, ordered me to make these measurements. I did not make them all myself. They were made under my supervision. I made a good many of them myself. I did not measure all the canals diverting water from Boise River on that day. The Riverside canal on that day was taking from the river 78.66 second feet. They had a supplemental supply of 44.41 feet from the Indian Creek canal, giving a total of 123.07 second feet. The decree of the Riverside was 206. They were carrying 123. The difference represents the amount which they had under their decree. The Riverside people were short in their decreed rights approximately 83 second feet. There were a number of other canals short on that same day. The canals I have named were the ones that we measured that had over their amount. I didn't say anything about the canals drawing much less than their right under the Stewart decree. The aggregate of the discharge of the canals measured was 1639 second feet, and the aggregate of the Stewart decree for these rights was 2133, or 77 per cent of the Stewart decree. Including the

old New York right, there were 403 second feet of the small canals that we didn't measure. I don't know whether they had all the water they were entitled to or not. The statement shows the difference between 1639 and 2133 second feet which these canals were taking less than their decreed rights under the Stewart decree. On a large canal, I don't regard a difference of two or three second feet as very material. We don't figure right down to the last item. The measurements are according to my estimate the most accurate that the science of hydrography can give. Measurements may vary. There is more or less fluctuation on the river always. We cannot segregate rainfall from other return flow. In cases where we know there is a heavy rain and there is a peak in return flow, we make a note of that as rain or something of that kind in the remarks, but to segregate the runoff from rain from the runoff from irrigation, we cannot segregate that very closely. In any of the measurements I have given, I believe I have made no allowance for rainfall.

Re-direct Examination: (Witness testifies:)

The canals that were diverting less than the Stewart decree on July, 1913, were scattered all along the river. There was water in the river available for all these canals down as far as the Canyon, and with the exception of the Farmers Co-operative and Riverside, there was water for all those below the Canyon. The Riverside and Farmers Co-operative could not have taken their full supply.

Q. "Do you know whether the capacity of any of these canals were less than the Stewart decree?"

A. "Yes, the capacity of some are less. Capacity of Ridenbaugh is approximately 400 second feet. The Stewart decree for this is 540 second feet. Stewart decree for Jacob's canal is 20 second feet and a fraction. The capacity with water running over the banks is between 8 and 10 second feet."

The Boise Valley No. 2, the return flow of Boise Valley to the river, Ballentyne waste, the Middleton Mill slough and Indian Creek—these four wastes, I have complete records of for the years 1911, 1912 and 1914. The total return flow for the months of July, August and September for these four return flows, for 1911 was 19,339 acre feet. In 1911 it was 21,722 acre feet. The measurements on Indian Creek for the two years of 1911 and 1912 are included in this. In 1912, the flow of Indian Creek was 2764 acre feet. July 1912, it was 2484 second feet. In July 1913, it was 6575 second feet. In 1914, it was 4634 second feet. In August 1913, it went down to 2700. The return for July 1913 was larger than any other year. I can give the monthly returns for 1911, 1912 and 1913. The discharge of these waste-ways for July 1911 was 9478 acre feet. In 1912, it was 6844 acre feet. In 1914, it was 8244 acre feet. *Cross Examination:* (Witness testifies:)

In July 1913, there was a very heavy rain. The return flow was probably affected by this condition. The rain was in the latter part of July. It was somewhere about the 24th or 25th.

Redirect Examination: (Witness testifies:)

Between the diversion dam and Notus, we got a return flow of 200 second feet, but we did not get the return flow that occurred below, that is, between Notus and Parma, which is taken into consideration in these canal rights. I think it was as low as 190 at the low water period at one time, but taking the rest of the return flow, I don't think that it was ever less than 200, that we have ever measured. I believe the comparison of the return flow as shown by these five channels is representative of the return flow as a whole.

ELIAS MARSTERS being called and duly sworn as a witness on behalf of the defendant with reference to the return flow at the time in question, testified as follows:

Direct Examination: (Witness testifies:)

I was a water commissioner of the State of Idaho in July 1913. The duties of my office involved the control and distribution of the waters of Boise River. That included the distribution of all the canals and laterals leading out of the Boise River from the highest point where there was any diversion to the lowest. I assumed control of the entire river. I have heard the evidence that has lately been given with reference to the question of the return flow to the Boise River. I understand what that means, sure. With two assistants from the State Engineer's office, I went down and measured the water, measured it several times in 1913, all the return flow. There had been—It had been suggested to us by some of the

ditches below that they weren't getting what water they were entitled to, and myself and two men from the State Engineer's office went down and measured these ditches, and measured the return flow, and we found we were short about 404 second feet, according to their estimates of the amount, to fill the Stewart decree, and they made a demand on me to take this water from the government, that they had 404 second feet more water that they were entitled to. I called up Mr. Bliss—in fact, I never met the gentleman until in court here yesterday; all our work was done over the telephone, and by correspondence—and I asked him for half of this water, and he wanted to know under what authority I was asking, and I said, "As State Water Commissioner," and he said, "What decree are you working under?" and I said, "The Stewart decree." And he said to me, "Don't you know that the Stewart decree is no longer in effect?" And I said, "No, I didn't know it," and he said, "You had better proceed to post yourself," and I said, "Sure, I will," and then is when I went to the Attorney General's office for advice, and they advised me what to do, and instructed me what to do, which I did do on the 11th.

Q. Was there any water wasting into Snake River on July 11, 1913?

A. There were.

Q. What was the nature of that and what was its amount?

A. Well, it wasn't but a very little. The head-gates at the lower center point had been fastened

down as tight as we could get them, and there was no water practically below the river at the lower center point canal. That was the last canal we had charge of on the river. There was a few other little canals that picked up waste water, that we never paid very much attention to, but I wouldn't say whether it was just before this or a few days after—that we measured the water at the Parma bridge, the men sent out by Mr. Wing and Mr. King of the State Engineer's office, to measure this water in all these canals, and we found, if I remember right, something like 77 second feet going under the Parma bridge at that time. That was five or six miles below the last canal.

Q. But at the last canal did you state that all the water was turned out?

A. Every bit of it.

Q. Coming up the river from the last canal, was there more water going into any canal, or to any water users' ditch, than they were entitled to?

A. Not according to my understanding, not according to the reports of watermasters on the river, there weren't.

Q. And that condition continued, did it, right up to the—

A. Right up to the diversion dam.

Q. The diversion dam?

A. Yes sir.

Q. In that way did you make allowance for all the water that got into the river, whether it came

from above the diversion dam or whether it came from any of the laterals or diversions below?

A. There wasn't any water coming in above the diversion dam below Highland. We got our readings from the Government of the amount of water in the river at Highland, and it never was considered that there was any waste or seepage to amount to anything between Highland and the diversion dam.

Q. Your distribution included all this water that came down the river to the diversion dam, plus all the water that came in below?

A. Yes sir.

Q. Under those circumstances all the water that came in was 404 second feet?

A. Yes sir.

Q. And you made demand on the government for that amount?

A. I made demand on Mr. Bliss for just half that amount, and he refused.

Q. What was your idea for making demand for just half?

A. Because the watermasters and ditch companies thought we could get along and let the government have that water for a few days longer, if it was possible to do so.

Cross Examination: (Witness testifies:)

I have been a farmer all my life and an auctioneer. I have been employed as water master in 1913 since the first day of April. I don't pretend to know how

to measure water flowing in a canal. I couldn't tell what number of second feet were flowing in a canal of certain capacity. These statements which I made with regard to the amount of water, I depended entirely upon what others from the State Engineer's department told me. I went with them when the measurements were made. Once or twice we measured every ditch on the river, and also measured the river at Highland. I think we measured the river at Highland three or four different times. I don't think we measured all the streams just prior to the time the locks on the government headgate were broken. We measured the Phyllis canal. We measured the Farmers Union canal; the Boise City canal; I think the Pioneer canal; the old Sebris canal and the Riverside. The amount these parties claimed they needed was 404 second feet to fill the decree, the Stewart decree of an inch per acre,—that is 2755 second feet. The water master reported to me that they could get along for a few days with half that amount and allow the government to have half of it for a few days longer. We were changing the canals and lowering them at that time, all of them; practically every day or two we would take a little slice out of different canals where they would lose their rights, where they were carrying a little more than their rights, I should say. By their rights, I mean their decreed rights under the Stewart decree. I heard it had been reversed by the Supreme Court as to the duty of water, but I know they had always worked under that part of it up until they got the temporary decree.

We measured Indian Creek, Mason slough—three or four that run into the river down by Caldwell—for return flow prior to July 11, 1913.

THE COURT: Either side may have thirty days in which to prepare the statement to be used on appeal.

Duly settled and allowed this 24th day of August, 1915.

FRANK S. DIETRICH.

Endorsed: Filed August 24th, 1915. A. L. Richardson, Clerk.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
VS.

ELIAS MARSTERS and E. F. LAKIN,
Defendants.

OPINION AND FINDINGS OF THE COURT.

The question as to the form of action, suggested by Mr. Wing, as well as by Captain Davis, in the course of the action, it seems to me is without any substantial merit. The plaintiff has come into court upon the theory that it had certain rights to the use of water of Boise River, and that these rights have been invaded. Now, it has pleaded the facts, and it is for the court to award such relief as is proper under those facts. It would seem to me to be quite impossible for a plaintiff whose rights have been violated to recover at all if we give place to the rather

technical view advanced under this head. Here was the plaintiff with a large irrigation system, through which it diverted water from the stream and delivered it to different persons for irrigation purposes, conceded to be a beneficial use and one for which water may be appropriated in this State. The plaintiff is not the owner of any lands, that is to say, it is not itself using the water, had no need for water for irrigation purposes, but it was selling it or renting it, and getting a certain consideration therefor from various farmers who had need of it. It seems to me if we lay aside any preconceived ideas of form and give heed only to substance, the damage which the Government suffered, if any, is the loss which it sustained by reason of not being able to supply the water to the persons entitled to it, and which it had the conduits to convey, and for which it had a demand. It strikes me, therefore, that the measure of damages resorted to by counsel for the government in the case is the only available one. It is the least possible damage that could be suffered, perhaps. It may be that if the farmers with whom it had contracts to deliver water suffered loss of crops as a consequence of the non-delivery, and could recover from the Government, the Government could recover an additional amount for the alleged interference with its rights. It would seem to me that the defendants are not here in a position to complain because this apparently small measure of damages has been resorted to. I really haven't any question at all about the general legal phases of the case. The great diffi-

culty is in adopting any definite theory in accordance with which I can make an estimate of the damage, that is, as to the amount of water that the plaintiff was entitled to from day to day. It is very easy to adopt any one of half a dozen different methods and arrive at different conclusions, and none of them is entirely unreasonable, but they all involve certain contingent factors and features which very materially affect the result. Perhaps that is not true of the claim for damages on account of loss of water for power. It is clear to me that the government had a right to use the water for the development of power. The mere fact that no express permit from the State Engineer is shown does not deprive it of the right to use water for that purpose. The use of it for that purpose is a beneficial one, and it erected its plant there and installed machinery, and developed power, and certainly no one without right or need could with impunity deprive it of the use of water which naturally flowed in the channel of the stream. No explanation has been given as to why the water was diverted into the canal and then permitted to waste out through this waste gate. It would seem to me that the defendants were very much wanting in the exercise of ordinary care in doing that, especially as their attention was called to it, as I understand the witness, Mr. Bliss, testified. He suggested to them at one time that they regulate the water by the intake gates rather than by these waste gates. Of course, that is the natural way to regulate the supply of water, by the intake gates rather than by the

waste gate. True, there is the uncertain factor of the amount of water which would naturally waste through these gates. They were not in perfect condition; that is conceded. There is also the possibility that the Government would not have gotten the full benefit of the water had it flowed into the river and through its turbines. A great many contingencies there are about the sale of power. Even though plaintiff had a contract, and even though it be now stated by Mr. Markhus, on behalf of the Idaho-Oregon Company, that he could and would have taken all the power, we know that there are contingencies.

I have concluded to allow on that account as damages the sum of \$200.00. And, without going into a discussion of the details of the allowance to be made upon the other account, and treating it a good deal as a jury would have to treat an issue of that kind in a damage case, where there are a great many possible views which may be taken, and where the jury may reconcile those views and reach a conclusion, I think I shall allow the sum of \$800.00, on account of loss for irrigation, making a total of \$1,000.00.

As I have said, there are methods by which the conclusion could be reached to allow nothing, or substantially nothing, on account of the loss for irrigation purposes, and on the other hand the amount could be increased to nearly \$5,000.00 on one basis of calculation; but I am inclined to think that this amount will do substantial justice. There is the consideration here that one of the defendants, per-

haps the chief defendant, was acting as a State officer, and apparently was acting under the advice of the Attorney General. While I have held, and still feel, that such advice was mistaken, and that the defendant did not act with due caution, still at the same time the benefit of whatever doubt there is should perhaps be indulged in favor of the defendant under such circumstances.

The judgment will be, gentlemen, that the defendants pay the sum of \$1,000.00.

MR. DAVIS: We desire to file our notice of appeal.

THE COURT: Very well.

Correct.

FRANK S. DIETRICH,

Judge.

Endorsed: Filed August 24, 1915. A. L. Richardson, Clerk.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
vs.

ELIAS MARSTERS and E. F. LAKIN,
Defendants.

JUDGMENT.

This cause came on to be heard at Boise, Idaho, on the 10th day of June, 1915, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows:

That the plaintiff have and recover from the defendants the sum of One Thousand (\$1,000.00) Dollars, with costs taxed in the sum of \$56.65.

June 16, 1915.

FRANK S. DIETRICH,
Judge.

Endorsed: Filed June 16, 1915. A. L. Richardson, Clerk.

*In the District Court of the United States, in and for
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
vs.

ELIAS MARSTERS and E. F. LAKIN,
Defendants.

NOTICE OF LODGMENT OF STATEMENT.

To the above-named complainant, and to B. E. Stoutemyer and James L. McClear, its attorneys.

You and each of you will please take notice that the defendants, Elias Marsters and E. F. Lakin, by their attorneys, have this day lodged in the office of the clerk of the said court, for the examination of the plaintiff and its attorneys, a statement of the evidence to be included in the record of the appeal in the said cause to the United States Circuit Court of Appeals for the Ninth Circuit, in accordance with paragraph (b) of rule 75, Rules of Practice for the courts of equity of the United States, in force February 1st, 1913.

You are further notified that on the 19th day of

July, 1915, at ten o'clock a. m., or as soon thereafter as counsel can be heard, in the judge's chambers at Boise, Idaho, the defendants will ask the judge of said court to approve the said statement.

Dated this 10th day of July, 1915.

J. H. PETERSON,
Attorney General.

E. G. DAVIS,
T. C. COFFIN,

HERBERT WING,
Attorneys for Defendants.

Service of the above and foregoing notice of lodgment of statement on appeal is hereby admitted this 10th day of July, 1915.

UNITED STATES OF AMERICA.

J. S. McClear,
J. R. Smead,
Its Attorneys.

Endorsed: Filed July 10, 1915. A. L. Richardson, Clerk.

*In the District Court of the United States, in and for
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
VS.

ELIAS MARSTERS and E. F. LAKIN,
Defendants.

PETITION FOR APPEAL.

The above named defendants, conceiving themselves aggrieved by the decree made and entered on

the 11th day of June, 1915, in the above entitled cause, do hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal be allowed and that citation issue as provided by law, and that the transcript of the record proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, State of California.

And your petitioners further pray that the proper order, touching the security to be required of them to perfect the appeal, be made.

J. H. PETERSON,
Attorney General.

E. G. DAVIS,
T. C. COFFIN,

HERBERT WING,
Attorneys for Defendants.

Endorsed: Filed July 10, 1915. A. L. Richardson, Clerk.

*In the District Court of the United States, in and for
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
vs.
ELIAS MARSTERS and E. F. LAKIN,
Defendants.

ASSIGNMENT OF ERRORS.

Come now the defendants and appellants by J. H. Peterson, E. G. Davis, T. C. Coffin and Herbert Wing, their solicitors, and say that the decree entered in the above cause on the 16th day of June, 1915, is erroneous and unjust to these defendants and appellants, and that in the records and proceedings in the above entitled cause, there is manifest error in this, to-wit:

I.

The Court erred in holding that there is no decree of the waters of the Boise River which is effective for any purpose whatever.

II.

The Court erred in holding that, under the statutes of the State of Idaho, a Water Commissioner has no power, through a water master appointed by him or otherwise, to control the diversion gates upon a stream the rights in which have not been adjudicated or otherwise definitely determined.

III.

The Court erred in holding that the defendant, Elias Marsters, as Water Commissioner, had no authority, under the laws of the State of Idaho, to take possession of the gates of the plaintiff and to distribute the waters of the Boise River according to the rights which had been established thereon, whether by user, adjudication of court or otherwise.

IV.

The Court erred in holding that the water rights

on the Boise River have not been adjudicated or otherwise definitely determined.

V.

The Court erred in denying defendants' motion to dismiss the bill of complaint filed by the plaintiff herein.

VI.

The Court erred in permitting plaintiff to file a supplemental bill of complaint herein.

VII.

The Court erred in entertaining jurisdiction and receiving evidence in this case which, in order to be decided favorably to the plaintiff must necessarily involve an adjudication and determination of water rights and the duty of water in the Boise River, after the attention of the Court had been invited to the fact that the question of water rights and the duty of water in the said river was and for a long time prior thereto had been pending before the District Court of the 7th Judicial District of the State of Idaho, in a suit brought for the determination of that very question.

VIII.

The Court erred in awarding damages in any sum to the plaintiff for the loss of water for irrigation purposes, the evidence wholly failing to show that, at the stage of the river on the days when, as alleged, the plaintiff was deprived of water and after supplying all prior rights with the amounts to which they were entitled, there was any water in any

amount in the Boise River which the plaintiff could lawfully divert at its headgates and claim as its own.

IX.

The Court erred in awarding damages in any sum to the plaintiff for the loss of water for irrigation purposes, the evidence showing affirmatively that on the 11th day of July, 1915, appropriators prior in time to the plaintiff were receiving from the Boise River much less water than the amount of their decreed rights, and that they were prevented from receiving the amount of their said decreed rights by the action of the defendant in taking from the river more water than it was entitled to claim.

X.

The Court erred in awarding damages to the plaintiff in any sum for the loss of power which may have been developed at its power plant on the Boise River, since the evidence shows affirmatively that the action of the defendant resulted in an increased power development, and since there is no evidence whatever, showing or tending to show that the plaintiff had any right to the use of the waters of the Boise River for power development, or the extent of that right, if any exists, or that, if any such right exists, the said right had been in any way impaired.

XI.

The Court erred in holding that damages for loss of water could be awarded to plaintiff without a full showing that the plaintiff was actually entitled to water at the time or times in question, after all prior appropriators had been fully supplied with the sev-

eral amounts to which they had become entitled, and the Court further erred in holding that this question could be determined without an adjudication of the duty of water and the number and amount of all prior appropriations of water on the Boise River.

XII.

The Court erred in holding that the plaintiff could collect damages for the loss of a given amount of water, there being no showing whatever that this alleged loss of water had resulted in loss of crops, or that the plaintiff could have sold the said water, of which it alleges it has been deprived, even though it had been allowed to divert the same freely and without let or hindrance.

XIII.

The evidence is wholly insufficient and inconclusive to sustain a judgment for damages in any amount.

XIV.

The Court erred in holding that the plaintiff having introduced in evidence the so-called Stewart decree (Plaintiff's Exhibit G) was not bound by all matters covered by the said decree, and the customary distribution of water thereunder.

J. H. PETERSON,
Attorney General.

E. G. DAVIS,
T. C. COFFIN,

HERBERT WING,

Attorneys and Solicitors for Defendants and
Appellants, E. Marsters and E. F. Lakin.

Residence: Boise, Idaho.

Service of a copy of the above and foregoing assignment of errors, together with the receipt of a copy thereof, is hereby admitted this 10th day of July, 1915.

J. L. McCLEAR,
J. R. SMEAD,
Attorneys for Plaintiff.

Endorsed: Filed July 10, 1915. A. L. Richardson, Clerk.

*In the District Court of the United States, in and for
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
VS.
ELIAS MARSTERS and E. F. LAKIN,
Defendants.

ORDER ALLOWING AN APPEAL.

This day came the defendants above named, and presented their petition for an appeal and an assignment of errors accompanying the same, which petition, upon consideration of the court, is hereby allowed, and the court allows an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, on the filing of a bond in the sum of Fifteen Hundred Dollars (\$1500.00) of good and sufficient security to be approved by the court.

FRANK S. DIETRICH,
District Judge.

Dated this 10th day of July, 1915.

Endorsed: Filed July 10, 1915. A. L. Richardson, Clerk.

*In the District Court of the United States, in and for
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
VS.
ELIAS MARSTERS and E. F. LAKIN,
Defendants.

BOND ON APPEAL.

Know All Men By These Presents, That the United States Fidelity & Guaranty Co., a corporation duly organized under the laws of the State of Maryland, and duly qualified and authorized to do business and to become surety on bonds within the State of Idaho, acknowledges itself to be indebted to the United States of America, appellee in the above cause, in the sum of One Hundred and Fifty Dollars (\$150.00), conditioned that, whereas, on the 16th day of June, 1915, in the District Court of the United States, for the District of Idaho, in that certain suit pending in that court, wherein the United States of America was complainant, and Elias Marsters and E. F. Lakin were defendants, a decree was rendered and entered against the said defendants, and the said defendants having obtained an appeal to the United States Circuit Court of Appeals of the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court, to reverse the said decree, and a citation having been directed to the United States of America, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State

of California, within forty-five (45) days from the 10th day of August, 1915.

Now, Therefore, If the said Elias Marsters and E. F. Lakin shall prosecute their said appeal to effect and answer all costs, if they shall make their plea good, then the above obligation will be void, otherwise to remain in full force and virtue.

UNITED STATES FIDELITY & GUARANTY CO.

By W. D. McReynolds, Attorney in Fact.

J. T. Pence, Attorney in Fact.

Approved: Frank S. Dietrich, District Judge.

Endorsed: Filed Sept. 1, 1915. A. L. Richardson, Clerk.

*In the District Court of the United States, in and for
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
vs.

ELIAS MARSTERS and E. F. LAKIN,
Defendants.

ORDER REDUCING BOND.

Whereas, On the 10th day of July, 1915, an order allowing an appeal in the above entitled cause was signed by me, in which the bond to be filed in the said cause was fixed at the sum of Fifteen Hundred Dollars (\$1500.00), the same to be a supersedeas and cost bond, and

Whereas, It has been made to appear to me that the said defendants are unable to obtain a bond in the said amount, and will, therefore, be unable, un-

less the said bond is reduced, to prosecute their said appeal;

Now, Therefore, It is Ordered, That the said appeal be allowed on the filing of a bond in the sum of One Hundred and Fifty Dollars (\$150.00) of good and sufficient security to be approved by the court, the same to constitute a bond for costs only.

FRANK S. DIETRICH,
District Judge.

Dated this 1st day of September, 1915.

Endorsed: Filed Sept. 1, 1915. A. L. Richardson, Clerk.

*In the District Court of the United States, in and for
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
vs.
ELIAS MARSTERS and E. F. LAKIN,
Defendants.

CITATION.

United States of America to United States of America, Greetings:

You are hereby notified that in a certain case in equity in the United States District Court, in and for the District of Idaho, wherein the United States of America is complainant, and Elias Marsters and E. F. Lakin are defendants, an appeal has been allowed defendants herein to the United States Circuit Court of Appeals of the Ninth Circuit.

You are hereby cited and admonished to be and appear in said court at San Francisco, State of California, thirty days after the date of this citation, to show cause, if any there be, why the decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness, The Honorable Frank S. Dietrich of the United States District of Idaho, this 10th day of July, 1915.

FRANK S. DIETRICH,
United States District Judge.

Attest: A. L. Richardson, Clerk.

Service of a copy of the above and foregoing citation, together with a receipt of a copy thereof, is hereby admitted this 10th day of July, 1915.

J. L. McCLEAR,
J. R. SMEAD,

Attorneys for Complainant.

Endorsed: Filed July 10, 1915. A. L. Richardson, Clerk.

*In the District Court of the United States, in and for
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
VS.

ELIAS MARSTERS and E. F. LAKIN,
Defendants.

STIPULATION RELATIVE TO RECORD ON
APPEAL.

It is hereby stipulated and agreed, by and between Elias Marsters and E. F. Lakin, appellants, and the

United States of America, appellee, through their respective solicitors, that in order to save expenses in the printing and certification of the record, and to avoid encumbering the record with papers and documents not pertinent to the consideration of the appeal, the following portions of the record and no more shall be transcribed, certified and transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit by the Clerk of the United States District Court for the District of Idaho, under the appeal taken by the said appellants herein, and shall be included in the printed record on said appeal, to-wit:

1. Bill of Complaint.
2. Notice to show cause why temporary restraining order *pendente lite* should not be granted.
3. Motion to dismiss.
4. Memorandum decision on demurrer.
(Motion to Dismiss.)
5. Affidavit of George H. Bliss, Project Manager.
6. Petition for leave of court to file supplemental bill of complaint.
7. Stipulation as to time of defendants to file answer.
8. Same.
9. Same.
10. Answer of the defendants.

11. Supplemental bill of complaint.
12. Answer to supplemental bill of complaint.
13. Statement on appeal, under Equity Rule 75 (b).
14. Opinion and findings of court filed in said cause.
15. Decree.
16. All papers filed for perfecting the appeal.
 - (a) Notice of lodgment of statement on appeal.
 - (b) Petition for appeal.
 - (c) Assignment of errors.
 - (d) Order allowing appeal.
 - (e) Bond on appeal.
 - (f) Citation and all orders made in connection therewith, with all admissions or returns of service of any of said papers.
17. This stipulation.

It is further stipulated and agreed that all exhibits introduced in the above entitled cause shall be transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, before the hearing of the cause in said court, and the same may be used upon the argument upon the hearing of said cause in said court, and shall be considered as a part of the record on appeal therein as fully and to the same extent as if transcribed and printed in the record.

It is further stipulated that it shall not be neces-

stary to reproduce or print in the record on appeal, any maps or plats introduced in evidence on the trial of said cause.

Appellants shall have the right, and they may be so required by appellee, if deemed necessary, and approved by the judge of the said district court or the circuit court of appeals, to print as part of the record on appeal, any exhibit or any other part of the record not hereby expressly authorized to be transmitted and printed.

Dated this 10th day of July, 1915.

J. L. McCLEAR,

United States Attorney.

B. E. STOUTEMYER,

Solicitors for Complainant and Appellee, the United States of America.

J. H. PETERSON,

Attorney General.

E. G. DAVIS,

T. C. COFFIN,

HERBERT WING,

Solicitors for Defendants and Appellants.

Endorsed: Filed September 1, 1915. A. L. Richardson, Clerk.

*In the District Court of the United States, in and for
the District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
VS.

ELIAS MARSTERS and E. F. LAKIN, Defendants.

PRAECIPE TO CLERK FOR TRANSCRIPT ON
APPEAL.

To the Clerk of the said Court:

You will please incorporate the following portions of the record in the above entitled cause into the transcript on the appeal in the said cause to the United States Circuit Court of Appeals, to-wit:

1. Bill of Complaint.
2. Notice to show cause why temporary restraining order *pendente lite* should not be granted.
3. Motion to dismiss.
4. Memorandum decision on demurrer. (Motion to dismiss.)
5. Affidavit of George H. Bliss, Project Manager.
6. Petition for leave of court to file supplemental bill of complaint.
7. Stipulation as to time of defendants to file answer.
8. Same.
9. Same.
10. Answer of the defendants.
11. Supplemental bill of complaint.
12. Answer to supplemental bill of complaint.
13. Statement on appeal, under Equity Rule 75 (b).

14. Opinion and findings of court filed in said cause.
15. Decree.
16. All papers filed for perfecting the appeal.
 - (a) Notice of lodgment of statement on appeal.
 - (b) Petition for appeal.
 - (c) Assignment of errors.
 - (d) Order allowing appeal.
 - (e) Bond on appeal.
 - (f) Citation and all orders made in connection therewith, with all admissions or returns of service of any of said papers.
17. Stipulation relative to record on appeal.
18. This praecipe.

J. H. PETERSON,

Attorney General, State of Idaho.

E. G. DAVIS,

T. C. COFFIN,

HERBERT WING,

Attorneys for Defendants and Appellants.

Service of the foregoing praecipe, with receipt of a copy of the same, is hereby admitted this 10th day of July, 1915.

J. L. McCLEAR,

J. R. SMEAD,

Solicitors for Complainant and Appellee.

Endorsed: Filed July 10, 1915. A. L. Richardson, Clerk.

RETURN TO RECORD.

And thereupon it is ordered by the Court, that the foregoing Transcript of the Record and Proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and the same is transmitted accordingly.

Attest:

A. L. RICHARDSON, Clerk.

By Pearl E. Zanger, Deputy.

*In the District Court of the United States, in and for
this District of Idaho, Southern Division.*

UNITED STATES OF AMERICA, Complainant,
vs.

ELIAS MARSTERS and E. F. LAKIN, Defendants.

CLERK'S CERTIFICATE.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript, consisting of Pages 1 to 164, inclusive, to be full, true and correct copies of the Bill of Complaint, notice to show cause why temporary restraining order *pendente lite* should not be granted, Motion to Dismiss, Memorandum decision on demurrer (Motion to dismiss), Affidavit of George H. Bliss, Project Manager, Petition for leave of court to file supplemental bill of complaint, Stipulations as to time of defendants to file answer, Answer of the defendants, Supplemental bill of complaint, Answer to supplemental bill of complaint,

Statement on appeal under Equity Rule 75 (b), Opinion and findings of court filed in said cause, Decree, Notice of lodgment of statement on appeal, Petition for Appeal, Assignment of Errors, Order allowing appeal, Bond on Appeal, Stipulation Relative to Record on Appeal, Praecipe, Original Citation, Return to Record, and Clerk's Certificate, and that the same, together constitute the Transcript of the Record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$191.80, and that the same has been paid by the appellant.

Witness my hand and seal of said court affixed at Boise, Idaho, this 14th day of September, 1915.

A. L. RICHARDSON, Clerk.

By Pearl E. Zanger, Deputy.